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COMMERCIAL LAW

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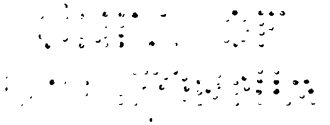
LYONS'

COMMERCIAL LAW

A TEXT BOOK FOR SCHOOLS AND COLLEGES AND A BOOK OF REFERENCE



BY

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Hillebrand

PREFACE

This work first made its appearance in 1894. It contained many features at that time new to text books on commercial law. The value of these features as well as the complete adaptability of the work to the class room were immediately recognized by a majority of commercial teachers and a large use was made of the work in their classes. The numerous editions made necessary by these demands have worn the plates and the publishers finding a new set of plates necessary have taken the occasion to add a number of new features that it is believed will add still more to the value of the work and that will bring the subjects herein treated even more fully within the comprehension of the pupil without business experience. A few paragraphs have been added treating of subjects of interest not treated in the first edition.

An occasional reference has been made to state reports of decisions. All pupils may not be able to make use of these but some will do so with profit.

The large number of States which have already adopted the Negotiable Instrument Act made it seem desirable to show wherein it differed from the Law Merchant on that subject. Accordingly this has been done.

The "Practical Cases" on negotiable instruments are new to a work of this character. They have been introduced to give the pupil some facility in discovering the defects in such paper from an inspection of the paper itself.

Finally several new business and legal forms have been introduced and the references brought down to date. In these additions it is believed teachers will generally concur.

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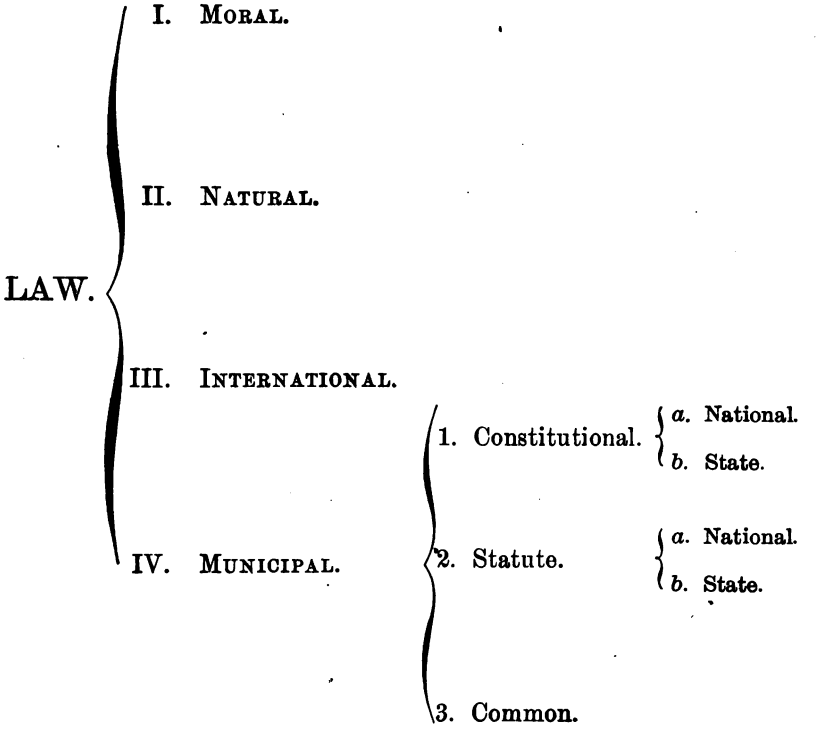
GENERAL OUTLINE OF LAW.



INTRODUCTION.

CHAPTER I.

1. Law in its broadest sense is a rule of action. Every law which is capable of being violated has a penalty attached; that is, if rightfully administered, its violation brings a painful consequence.

2. Kinds.—There are four general kinds of law, namely: (1) *Moral*, (2) *Natural*, (3) *International*, and (4) *Municipal.*

3. Moral Law is prescribed by God for man's conduct—as for instance, the ten commandments.

4. Natural Law includes all that body of laws which apply to matter, and which, when collected and classified, form the basis of all sciences.

EXAMPLES.—The laws of falling bodies, the laws of sound, the law of self-preservation, etc.

To follow out this branch of law would lead us into almost every branch of science and field of human inquiry.

5. International Law is a code of rules recognized by all civilized nations as governing their intercourse with each other. It is founded on justice.

6. Municipal Law is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong. It is of human origin, and in its attempts to command what is right and prohibit what is wrong, it will be found to closely follow or coincide with the moral law. Yet these laws are not always identical.

The moral law does not prohibit smuggling, yet the municipal law does; on the other hand, the moral law will not excuse the non-payment of a just account, no matter how long it may have run, but the municipal law does do so after the lapse of a certain time.

7. Necessity of Laws.—It would be hard to imagine a state without a code of municipal laws, in fact, none could exist, because its very existence depends upon the cohesive force of such laws to bring and keep the people together as a state. Without it there would be no organization, nothing but a mass of individuals. If man were perfect and always inclined to do right to his fellow man, no such system of laws would be necessary. But such is not the case, and the enactment of laws is simply an effort on the part of society to protect itself.

8. Extent of Laws.—As each state or nation must have its own laws governing the civil conduct and property of its citizens, it follows that these laws have full force and effect only within its boundaries. All persons within its boundaries must obey them, whether citizen or stranger, and all property within its borders is likewise subject to its provisions, regardless of the residence of the owner.

9. Kinds of Municipal Law.—Municipal law as applied to our own country is divided into three parts, namely: (1) *Constitutional*, (2) *Statute* and (3) *Common*. They are here arranged in the order in which they take precedence. Before entering upon a discussion of these different branches of municipal law it will be well for us to study the general plan of our government and its methods of framing and passing laws.

10. Origin of Our National Government.—The thirteen original states were thirteen entirely distinct and separate colonies all belonging to Great Britain and subject to her laws. The revolutionary war freed them from the rule of the mother country and left them thirteen distinct governments, if indeed they can be said to have had a government at all. Each was a sovereign state or nation. Having united their efforts in a common cause in throwing off the parental yoke and being exposed to a common danger of attack by the Indians, it is not surprising that they decided to form a more perfect union and to establish a new and general government, of which they would each be a component part. In the formation of this general government each sovereign state gave up a portion of its rights and powers, still reserving and retaining, however, the larger part of these rights and powers for itself. Each state gave up the same rights and powers, and this body of rights and powers so relinquished in favor of the general government, was incorporated into

that now famous instrument called the *Constitution of the United States.*

11. The Constitution.—This constitution is therefore an enumeration of all the rights, powers, and privileges of the national government. When we bear in mind the history of its formation we can readily see that the national government can have only those rights and powers which are specifically enumerated in its constitution or are to be clearly inferred therefrom. It is therefore said to be "a government of limited powers." In accordance with this constitution a president is elected and a legislature or congress consisting of two bodies, the senate and house of representatives. A system of courts is also established for the interpretation of the laws made by the national government.

CHAPTER II.

INTRODUCTION—CONTINUED.

12. State Governments.—There is a government in each state organized in substantially the same manner as the national government, the basis or fundamental law of which is a constitution. Unlike the national government, however, a state government possesses all powers of sovereignty possessed by any nation, with the exception of those powers and rights heretofore mentioned as having been given up to the national government, and also with the exception of the restrictions which the people themselves have placed on their government in their constitution.

13. Difference between State and National Constitutions.—From the brief history of both state and national constitutions given above, it will be readily seen that they must differ widely in their scope. The national constitution is an enumeration of certain rights and powers, and the state constitution an enumeration of restrictions placed upon the state government by the people themselves. We here see two governments, distinct yet supplemental, in operation over the same territory, but not in any sense conflicting. Each has its functions, each has its own laws, and each is limited and controlled by its constitution.

14. Statute Law.—A bill in order to become a national law must receive a majority of the votes of each house of congress and be signed by the president, or if vetoed by him it can still become a law by a two-thirds majority vote of each house. A law passed in this manner is called "a national statute." It is, of course, formally expressed and exact in its terms. The statutes in force are collected and published by the authority of the government.

In a similar manner laws are passed by the state legislature and signed by the governor. These are called "state statutes."

15. Common Law.—The common law originated in England so long ago that its exact origin is a matter of some doubt. The general opinion is that it arose from the customs of the times and long usages which finally came to have the full force and effect of laws.

The rule of giving to makers of promissory notes three days (called days of grace) more than stated in the note itself, arose originally out of a custom which, gradually becoming more general and certain, finally was recognized by the courts as a right belonging to the maker. In other words, what was first a custom finally came to have the significance of a law.

The common law is sometimes called the "*unwritten law*," because it is not formally expressed as is statute law, but is found in the reported decisions of courts. The common law was in force in England at the time of our separation from her. It had, of course, up to that time been in force in the colonies and the people were familiar with it. Therefore they naturally chose to adopt it and declared it to be still in full force and effect, so far as it was applicable to themselves.

".....That the common law of England so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."—*Act of the General Convention of Delegates of the Colony of Virginia, held at Williamsburg, Monday, May 6, 1776.*

Similar statutes have been passed by most if not all of the states except Louisiana, which adopted the civil law instead.

16. Order of Precedence.—The national constitution consists of certain rights and powers relinquished by the states to the general government; it is, therefore, the supreme law of the land in regard to all matters contained in it. The national statutes, being made in strict accordance with the constitution, must necessarily come next in order. The states, as we have seen, reserve to themselves supreme authority on many questions; they have also placed numerous restric-

tions upon their own government. In regard to all these matters the state constitutions of the several states are supreme in authority. State statutes made in accordance with the state constitution are next in authority, and lastly stands the common law. When there is a conflict between the statute of a state and the common law, the statute takes precedence until repealed, when the common law again comes into operation. The common law is in force wherever there is no statute upon a subject, and it thus supplies what in many cases would be a great deficiency in our statute law. No legislators could possibly foresee and provide for all the possible contingencies and difficulties that could, and do, arise in the business relations of a complex civilization.

17. Commercial Law is that branch of the common law which more particularly pertains to contracts and the ordinary affairs of business. It embraces more than the old "law merchant," for that was mainly concerned with marine affairs and bills of exchange.

Being a branch of the common law, its source is the same as is the common law, and it is modified or annulled by statutes in the same manner.

PROPERTY.

CHAPTER III.

PROPERTY.
- KINDS. . .
  - I. Real.
  - II. Personal.
    - *a.* Things in action.
    - *b.* Things in possession
- HOW HELD.
  - I. In Severalty.
  - II. In Joint Tenancy.
  - III. In Tenancy in Common.

18. Definition.—Property in its legal sense is the right which one has in anything to the exclusion of every one else. It will thus be seen that it is not the thing itself that constitutes property, but it is the exclusive right to it or to a certain part of it. When a thing is sold it is simply the right to it that is transferred, although the possession or custody of the thing itself may or may not be transferred. The common acceptation of the term property, however, is the thing itself.

19. Kinds.—There are two kinds of property—*real* and *personal*.

Real property, or real estate, includes all property of a fixed or immovable character, such as land, together with what is permanently attached to it, or is built or growing upon its surface, and the minerals that are beneath. Improvements are, however, sometimes made upon realty under such circumstances as to still remain in the eyes of the law separate and distinct. (See Fixtures.)

Personal property is anything that is movable, or capable of attending the person of the owner, hence called personal property. "Chattels" is a term also used in the same sense. Trees while growing upon the land are usually considered as real estate, but when cut and lying as logs or lumber they are personal property. Thus minerals

while yet in the earth are a part of the realty, but when dug and thrown out on the ground they become personal property. On the other hand, that which is personal property may again become realty by becoming a part and parcel of it—as posts driven in the ground for a fence and the boards which are nailed upon them.

The right to the use of land for a term of years, no matter how long or how short, is regarded as personal property.

As a further illustration of the fact that in a legal sense property is the right to a thing, and not the thing itself, observe that one may contract to buy or sell a right simply. A copyright, a patent, the right of way over another's land, are all proper subjects for contracts. Although there is nothing tangible to pass, yet these rights are frequently valuable. Of the same nature is the good will of a business. It may be worth more than the chattels that go with it.

20. Kinds of Personal Property.—Personal property is of two kinds: (1) *Things in possession*, and (2) *Things in action.*

Things in Possession.—If one has the right to a certain thing and also the possession thereof, such as a horse, a book, or a desk, such property is a thing in possession. It will be noticed that it requires both the ownership and the possession to constitute a thing in possession.

Things in action include all personal property one may own and yet not have the possession thereof. It is called a thing in action because if the owner's right to the possession of such property be denied he can bring suit or action to reduce it to his possession. Accounts, promissory notes, and all forms of indebtedness are examples of things in action. If one has the mere possession of an article but does not own it, it is not a thing in possession to him but is a thing in action to the owner.

Or again, A may have a thing in possession, such as a horse; he sells this to B, taking his note therefor,—this note is a thing in action. At maturity B pays the note and the money received constitutes a thing in possession.

21. How Property Is Held or Owned.—With respect to the number of owners, property is usually held in one of three ways: (1) *In severalty*, (2) *in joint tenancy*, and (3) *in tenancy in common*

Severalty. The most common way in which property is held is in severalty. This is where it is all owned by a single individual.

Joint tenancy. At common law when two or more persons purchase or are granted lands or tenements, they are said to be joint tenants, and the estate is a joint tenancy. The owners each have the

same interest and an equal interest, not only in each and every part, but in the whole, and each is likewise entitled to the possession of the whole. They simply hold and occupy it jointly, and each receives an equal share of the proceeds or increase. The peculiarity of this estate is the *right of survivorship*, by virtue of which if one of the joint tenants dies his share is divided equally among the survivors.

In some states the right of survivorship has been abolished by statute.

Joint tenancy can only arise by purchase or by will, and never by descent.

Tenancy in common is practically the same estate, except that the tenants need not have equal shares and they do not have the right of survivorship.

That is, a certain piece of property may be owned by three persons, one of whom owns one-half and the other two each one-fourth, which could not be the case in joint tenancy.

Each, however, is entitled to the possession of each and every part, and to the same proportion of the increase or profit as he owns of the whole. The right of survivorship does not exist in tenancy in common, consequently when a tenant in common dies his share passes to his heirs instead of to the survivors.

Joint tenancy was favored by the common law, but the statutes of many states now require that the intention to create a joint tenancy must be clearly stated, otherwise it will be considered to be a tenancy in common.

GENERAL OUTLINE OF CONTRACTS.

CONTRACTS.

I. ESSENTIALS.
1. Competent Parties.
2. Agreement or Assent.
3. Consideration.
4. Legal Subject Matter.

II. KINDS AS TO VALIDITY.
1. Valid.
2. Void.
3. Voidable.

III. KINDS AS TO SOLEMNITY.
1. Specialty, always Written.
2. Parol
   a. Written.
   b. Oral.
   c. Implied.

IV. KINDS AS TO EXPRESSION.
1. Expressed.
2. Implied.

V. KINDS AS TO TIME OF PERFORMANCE.
1. Executed.
2. Executory.

VI. KINDS AS TO RELATION OF OBLIGORS.
1. Joint.
2. Several.

CONTRACTS.

CHAPTER IV.

22. Definition.—A contract is an agreement between two or more competent parties, based upon a sufficient consideration, to do or not to do some lawful possible thing.

It will be noticed that this definition naturally divides itself into four parts, and as each of them is absolutely essential to the validity of every contract, they are called the *essentials of a contract.*

23. Essentials of a Contract.—The essentials are as follows:

I. Competent Parties.
II. An Agreement, or Assent.
III. Consideration.
IV. Legal Subject Matter.

These will each be discussed in separate chapters to follow.

24. Importance of Contracts.—The importance of the law governing contracts cannot be overestimated, for contracts constitute the sum and substance of all business transactions. You go to the market in the morning for your breakfast steak; you get upon the street car to ride to your place of business; you buy the morning paper from the newsboy at the corner; all these acts imply contracts, and the rules of law applicable to them are as clearly defined as though they each involved thousands of dollars; in fact, these rules of law are the same, no matter whether one cent is involved or a thousand dollars.

The study of commercial law is substantially a study of contracts. It is, however, the plan of this work to give under this head only such general rules of law as are applicable alike to all contracts, leaving to each particular class of contracts the discussion of those features that are peculiar to it.

25. Division of Contracts.—Contracts are considered in five different ways, as follows:

I. As to Validity.
II. As to Solemnity.
III. As to Expression.
IV. As to Time of Performance.
V. As to Relation of Obligors.

These will now be considered separately.

26. As to Validity, contracts are:

I. Valid.
II. Void.
III. Voidable.

A valid contract is one which contains all the elements of a contract,—one which the courts will enforce.

A void contract is one that was of no effect from the beginning—one that neither party could have enforced at any time. It is an agreement which the law forbids any one to make.

A agrees with B, for a consideration, to go to a foreign country, buy dutiable goods and smuggle them into the United States. This is a void contract, and neither party could compel the other to comply with it. Nor could A collect his charges from B after performing his part of the contract.

A voidable contract is one that may or may not be enforced at the option of one of the parties. It is one that is capable of being avoided if it is so desired.

A, who is a child, agrees with B, an adult, to purchase a valuable horse. A being a minor, may take the horse or not, as he wills. His contract is a voidable one.

27. As to Solemnity of Contracts, the most general classification is as follows:

I. Specialty, always written.
II. Parol, { *a.* Written. *b.* Oral. *c.* Implied.

28. A Specialty is always in writing, signed and under seal. To seal a contract is to place a small wafer, or scroll, immediately after the signature. It is the theory of the law that placing the instrument under seal denotes a certain solemnity and deliberation in the making, and therefore, in such cases a *consideration is presumed,* whether one is stated or not. Seals are of very ancient origin,[1] in fact they were used before writing became a common accomplishment.

[1] 1 Kings, chap. 21. Daniel, chap. 6. Esther, chap. 8. Jeremiah, chap. 32.

The body of the instrument was written by a public scrivener, but the parties, not being able to write even their own names, indicated that it was their deed by the imprint of their private seals. It was the custom to have the seal engraved on the ring, that it might always attend the owner and be ready for instant use, and also to insure its privacy.

A drop of molten wax or the waxen wafer was put in place, and an imprint of the seal made upon it.

Although the necessity for seals has long since ceased to exist, yet they still remain as a monument to the reluctance with which the law gives up old-established usages and forms.

SHAKESPEARE'S SIGNET RING.

Some states[1] have by statute abolished seals altogether, while others,[2] though still requiring them to be attached to the most important contracts, such as for the sale and transfer of real estate, permit them to be made by a simple scroll of the pen. All contracts other than specialties are called parol.

29. Parol.—By far the larger proportion of contracts are parol, or as they are sometimes called, simple contracts. All implied contracts are parol contracts. Parol contracts are all contracts that the parties have not placed under seal. They may be either written, oral or implied. So far as importance goes, a written contract is of no higher order than an oral, yet the written contract often facilitates its own proof.

30. As to Expression, contracts are also divided into two classes, *expressed* and *implied.* An expressed contract is one whose terms are definitely stated and agreed to. It may be either a written or an oral contract. An implied contract is one whose terms are a matter of

[1] Alabama, Arizona, Arkansas, California, Colorado, Georgia, Indiana, Indian Ter., Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington.

[2] Connecticut, Delaware, Illinois, Michigan. Missouri, New Mexico, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Washington, Wisconsin, West Virginia.

inference or deduction from the acts of the parties. The law presumes or infers such agreements to have actually been made, as justice and equity would dictate, or as would give an honest explanation of the acts of the parties concerned.

When I get upon a street car for transportation, although nothing is said at the time of entering about the payment of any fare, yet the law implies an agreement on my part to pay the usual fee.

There is also an implied condition to every contract, that if I fail to perform my part thereof I will pay the other party such damages as he may have sustained by my neglect or refusal. Indeed, it is upon this theory of implied contracts that the law often gives relief where otherwise the injured party would be remediless.

31. Contracts, as to Time of Performance.—With reference to the time of their performance, contracts are either *executed* or *executory*. An executed contract is one whose conditions are already fulfilled. If the conditions are to be performed in the future, it is an executory contract. A contract may be an executory one to-day, and to-morrow it may become an executed one. This distinction is an important one, and the student will do well to bear it in mind.

32. Joint Contracts are those in which the obligors are jointly bound to perform the obligation. They promise to perform as one person. As a rule if an action be brought on the contract, both must be sued. In like manner if two or more persons be interested in the proceeds of a contract they cannot split up the claim and each sue for his share but must join in an action.

33. Several Contracts are agreements in which each promises to do the whole thing promised. But one performance, however, can be legally demanded. Each of the obligors may be sued for the entire debt. When several persons are jointly or jointly and severally liable on a contract and one discharges it, he can compel the others who have not paid their share to contribute.

CHAPTER V.

PARTIES.

34. Definition.—The parties to a contract are those who make it, and are affected by its terms.

35. General Rule.—The general rule is that all persons, aside from a few well defined exceptions, may make contracts. These exceptions the law makes either to shield the persons themselves from their own acts, or to protect the government. In the majority of cases it is the former reason. Certain classes are forbidden to make contracts because the law does not believe them to know what is for their own best interests.

36. Exceptions.—The general rule, however, is as we have stated it, and the exceptions arise for two reasons, as follows:

I. Mental Disabilities. .....
1. Lunacy.
2. Idiocy.
3. Intoxication.
4. Profligacy.

II. Legal Disabilities in Case of
1. Infants.
2. Married Women.
3. Alien Enemies.

37. Lunacy.—Lunatics are those who have lost their reason, and are, therefore, unable to understand the nature and effect of their acts. The minds of some are totally destroyed, while others are deranged only as to certain things, and are perfectly sane as to others. It has been held that on the latter subjects a lunatic may contract as if entirely sane.

It is also admitted that if an insane person have lucid intervals, he may, during those intervals, enter into contracts that will be binding upon him at all times.

The question of insanity may arise when one party seeks to avoid a contract he has previously made. As the law always presumes the natural thing or condition to exist, his insanity must be shown by the lunatic or his representative. Until this is shown by legal evi-

dence, his contracts are supposed to be valid. If he were insane at the time of making the contract he can avoid it or affirm it, as he may choose. Hence his contracts are *voidable*, but only voidable at his option, and not at the option of the other party who is bound thereby.

The statutes of the different states provide that all persons of unsound mind may be put under guardianship. This being done by a competent court, the legal ability to contract for everything (except in certain cases for necessaries), is taken from him and vested in the guardian. This is true of idiots and spendthrifts as well. Hence after the appointment of legal representatives their contracts are *void.* (*145 Ind. 673, 56 No. E. Rep. 98.*)

38. Exceptions.—Like all persons who are not permitted by law to contract generally, a lunatic is allowed to make *bona fide* contracts for necessaries, which include all such things as are useful to him, and proper for his means and station in life.

The price he agreed to pay may not be upheld, but through the theory of implied contracts a reasonable price may be substituted.

It will thus be seen that some contracts of an insane person are *valid*, some *voidable*, and others that are actually prejudicial to his interests are *void.*

39. Idiocy.—An idiot is one who is so deficient in intellect that he is incapable of understanding the nature and effect of his agreements. For his own protection the law will not, therefore, permit him to make contracts that will be binding upon him, excepting, of course, for necessaries.

40. Intoxication, when so complete as to render a man incapable of acting intelligently, will incapacitate him from contracting. As he can without doubt affirm his agreements when he becomes sober, his contracts are *voidable.* If he bought goods when intoxicated, he must return them if he would repudiate the purchase. A slight intoxication will not render him incapable of contracting. He may, as in the case of lunacy, contract for necessaries. When one has been found to be an *habitual* drunkard his property is cared for as in lunacy, by a conservator.

41. Profligacy.—When a person is found by due process of law to be a spendthrift, he may, as in the case of lunacy, be deprived of all control over his property, which will be placed in charge of a con-

servator. This is done on the ground that he may become a public charge. He is not presumed to be a spendthrift until so proven, and hence any contracts he may make up to this time are *valid*, unless fraud can be proven, but after the appointment of a conservator his contracts are *void*.

42. Infancy.—In the eyes of the law every person is an infant until he has become of age. Males in most states become of age at twenty-one. In some states a female becomes of age at eighteen[1] and in some at marriage if younger.[2]

A child's first birthday is the first day of his second year, and as the law does not regard portions of a day, he becomes of age at the first moment of the day before his twenty-first birthday.

While he is yet a child the law does not regard him as able to know and defend his own best interests, and for this reason seeks to protect him.

43. Ratification of Contracts Made by Infants.—As a general rule the contracts of an infant are voidable. That is, he may either during his minority, or within a reasonable time after he becomes of age, avoid the contract if he will. If the contract be an executed one, as for instance for a horse which has been delivered to him, and he now seeks to recover the purchase money paid, he must, if possible, also return the horse.

The law does not appear to be well settled as to whether, on the principle of "silence gives consent," mere silence on the part of the infant for a reasonable time after becoming of age, will in itself be construed as a ratification, or whether he may wait until the other party seeks to enforce it against him before disaffirming it. Some decisions have held one way and some another. A few states go even farther, and require the ratification to be express and in writing.

44. Who may take Advantage of the Rule.—The right to plead infancy as a defense is a personal privilege, and belongs only to the infant. It cannot be used by the other party to the contract for he is bound by the contract if the infant so desires.

It makes no difference that the adult had no knowledge of the infancy or lunacy of the other party to the contract and took no

[1] Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Missouri, Mississippi, Maine, Maryland, New Jersey, New York, New Hampshire, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, North Carolina, Texas, Utah, Vermont, Wyoming, Wisconsin, Washington.

[2] Iowa, Oregon, Washington.

advantage of him still the infant or lunatic may disaffirm if he wishes.

It is good advice to avoid contractual relations with an infant or a lunatic, for if the contract prove valuable to him he may retain its benefits and on the other hand if it prove onerous he may avoid it.

45. Necessaries.—While it is the general rule that an infant cannot make contracts that will be binding on him, yet there are exceptions to it. He may make valid contracts for necessaries furnished him. The price he may agree to pay will not be upheld if it be exorbitant, but a reasonable one will be.

Necessaries include food, clothing, shelter, medical attendance and instruction and must be such as are suitable to his station in life and within his means. Hence, what would be deemed necessaries for one might be luxuries for another.

46. Married Women.—Under the common law during the life of her husband the legal existence of the wife was merged in that of her husband. This was upon the principle that they were one person. All personal property she may have had at the time of her marriage became his, and as this took her means to pay her ante-nuptial debts the husband was charged with them. She could make no contracts while living with her husband, that would either bind him or her except when she did so as his agent. He was entitled to her earnings. But if he did not supply her with the necessities of life and she were not at fault she could purchase them and he would be bound, it being implied that she had authority to act as his agent.

47. Statutory Changes.—There is perhaps nothing in the common law that the statutes of the several states have changed more than the rules in reference to married women. In many states she can now hold property and make any contracts in reference to it the same as if single. At marriage she may retain and manage her own property.

48. Alien Enemies.—When two countries are at war the subjects of each are alien enemies to the subjects of the other. The law prohibits all commerce between the countries and makes all contracts so made void. It does this not alone because the interest of a citizen might become antagonistic to his government but in order to prevent him from withdrawing the resources of his country to the benefit and encouragement of the enemy.

CHAPTER VI.

ASSENT.

49. Meaning.—Assent is the meeting of the minds of the parties to a contract or their agreement to a certain thing. This consists of two parts—a proposition and an acceptance.

50. Proposition.—The first step toward the making of a contract is to make a proposition. This is a mere offer, and so long as it is not accepted it is of no binding force, and may be withdrawn. As a rule, when the parties are together when a proposition is made, it must be accepted at once, for if they separate it cannot be accepted later. The general rule is that a proposition remains open for a reasonable time, and what is a reasonable time must be determined by the circumstances of each case. Of course a proposition may be withdrawn at any time before acceptance, unless the proposer be paid for keeping the proposition open.

51. Proposition with Time.—When one makes a proposition and states a definite time for which it will remain good, it is sufficient if accepted within this time, provided it is not previously withdrawn.

52. Written Proposition.—When a proposition is made by letter, it is accepted as soon as the letter of acceptance is mailed, and it matters not that a letter of withdrawal be mailed before the letter of acceptance, provided it has not yet reached the acceptor. Such a proposition is deemed a continuing one from the time it is mailed until it be received, and for a reasonable time thereafter. Within this period it may be withdrawn at any time previous to acceptance, but it is not withdrawn until the notice actually reaches the one to whom the offer was made.

If A in Boston, on the first of January, write to B in Chicago, making an offer, and this letter reaches Chicago on the 3d, and B forthwith answers the letter, accepting the offer, putting the letter into the mail that day; and though on the second, A writes withdrawing the offer, and his letter of withdrawal reaches B on the fourth, nevertheless a contract has been made. Why?

53. A Proposition with a Condition.—Sometimes an offer is made saying "If there be no answer by a certain time I shall consider the offer accepted." Although no word be received during the time specified, yet there is no contract, for the offerer has no right to impose such a condition. On the other hand, if the offer be made saying "If no word is received from you by a certain time, I shall conclude that you do not accept," and no word is received, the offerer is safe in considering it no contract. This is in effect stating the limit of time for which the offer is good.

54. Giving an Option.—We have seen that an offer may be made, which is to hold good for a certain length of time. But the offer may be withdrawn at any time before acceptance, for the proposer has not been paid for keeping his offer open. It is customary, therefore, in order to be sure of time in which to investigate the offer, to pay the proposer a small sum for keeping the offer good for a certain time. This is called "giving an option" by the proposer, or "securing an option" by the other party. When the proposer is thus paid for keeping the offer good, he cannot within this time withdraw it.

A and B are publishers. A asks B what he will take for the whole edition of a certain book. B replies $3,500. A gives him $10.00 for the option for thirty days. In twenty-nine days A comes for the books, having decided to take them. Can B withdraw his proposition? Why?

A, a stock buyer, asks B, a farmer, what he will take for a drove of cattle. B replies $2,000, but A does not accept and drives away. Changing his mind, he returns in an hour and says he will take the cattle at the offer, but B now declines to sell for less than $2,500. Has A a right to the cattle?

55. Acceptance.—The parties must agree, or assent, to exactly the same thing, and in exactly the same sense, or one of the essential elements of a valid contract is lacking. If any condition is added to the acceptance, it is not such an acceptance as will constitute an agreement, for the minds of the parties do not meet. It will amount, however, to a new proposition, which may or may not be accepted by the original proposer.

A, of Chicago, telegraphs B, of New York, that he will sell him five car loads of good corn at a certain price. B replies that he will take it, but will expect it to be *clear yellow* of first quality. Is this a contract? Why?

When both the proposition and acceptance are sent by mail the acceptance cannot be overtaken and withdrawn by a telegram, even though it reach the proposer before the letter of acceptance. There are cases to the contrary however.

56. Implied Acceptance.—No set form of acceptance is required,

but it may be signified by a nod, a wink, a motion of the hand, or the drop of the hammer in case of an auction. In case one accepts the benefits of an offer, the law will imply his promise to pay a fair price for the same.

You give your grocer an order to deliver certain groceries at your house. Nothing being said about the price, the law will imply your promise to pay a reasonable price for them.

57. Duress.—Not only must the acceptor give his assent, but he must give it freely and without fear of compulsion. If one be thus compelled to give his assent, he is said to be laboring under *duress*, and the contract is not binding upon him. Duress is fear of personal injury or unlawful imprisonment. The imprisonment with which he may be threatened, however, must be unlawful, and the threats which cause him fear must be such as are calculated to inspire fear in the mind of a person of ordinary firmness.

58. Fraud.—In like manner assent should be given with a full understanding of the thing assented to, and if your assent has been obtained by any willful deception or misrepresentation on the part of the other party, you are not bound thereby. So far as you are concerned the contract is voidable, and at your option.

A wishing to purchase some pear trees of a certain variety, goes to a nurseryman for them. The nurseryman not having that variety, but wishing to make the sale, falsely represents that another, but inferior kind, is the one called for. After taking the trees home A is informed by an employee of the nurseryman that he has been deceived, and insists on returning the trees and demands back the money paid. Can he return the trees and compel the return of the money paid?

59. Mistake.—It is an old saying that "ignorance of the law excuses no man," but ignorance of a fact, *if mutual*, may relieve the parties from their contract.

A goes to the store of B for a bushel of potatoes of a certain variety, which he wishes to plant. Seeing what he supposes to be this variety, he purchases them. On taking them home he discovers them to be another variety. He cannot return them, for B did not sell them to him as the variety he wished. Had B thought them to be this variety, and so informed A, then the mistake would have been mutual, and A could return them.

A asks B what he will take for an arm chair; B speaking indistinctly says $35, but A thought he said $25. When it came to paying for the chair they differed as to the price. As their minds did not meet on the same thing, there is no contract.

CHAPTER VII.

CONSIDERATION.

CONSIDERATION.
- I. SUFFICIENT.
  1. Benefit to Promisor.
  2. Loss to Promisee.
  3. Mutual Promises.
- II. NOT USUALLY SUFFICIENT.
  1. Gratuitous.
  2. Impossible.
  3. Moral.
  4. Executed.
  5. Illegal.

60. Definition.—Consideration is the material cause which moves a party to enter into a contract. What is consideration for one party is subject matter for the other.

It is one of the essential elements of a valid contract. Without it the agreement is utterly void and no suit can be maintained upon it.

Not everything that may in reality serve as an inducement to enter into a contract is considered in the eyes of the law as a legally sufficient consideration. Legally sufficient consideration is divided as follows:

1. BENEFIT TO PROMISOR.
2. LOSS OR INCONVENIENCE TO PROMISEE.
3. MUTUAL PROMISES.

} These are usually designated in legal documents as valuable considerations.

61. Valuable Consideration consists of (1) a benefit to the promisor, (2) loss or inconvenience to the promisee, or (3) mutual promises.

A goes to the store of B and agrees to pay him $15 for an easy chair. The receipt of the chair is a benefit to A, the promisor, and its delivery a loss to B, hence it is a legally sufficient consideration. Had A agreed to give $15 and B agreed to deliver the chair to C, this would still be a sufficient consideration, for although it was of no benefit to A, yet it was a loss to B to give up the chair.

From this illustration we see that the consideration need not pass directly between the parties to a contract, but may go to a third person.

62. Mutual Promises will support each other, one being a consideration for the other. They must, however, be made at the same time. It is not necessary that either of the promises be to do something. It is sufficient if one or both of the promises be to refrain from doing something.

If A promises to teach B a trade it is a sufficient consideration for a promise from B to remain with A a certain length of time and serve him.

63. Adequacy.—We have seen that there must be a consideration to every contract, but whether the thing given is equal in value to the thing received does not ordinarily concern the law. It is sufficient if it have some substantial value, its adequacy being left to the parties themselves. There must, however, be no fraud connected with the contract.

Insufficient consideration may be divided as follows:

1. Gratuitous.
2. Impossible.
3. Moral.
4. Executed.
5. Illegal.

64. Gratuitous.—A promise for which there is no consideration cannot be enforced. There is no benefit to the promisor, no trouble or loss to the promisee. Even love and affection will not support a promise, though a gift will be upheld in an executed contract.

A owes B $50 due to-day. A finding it difficult to raise the money asks B for an extension of 30 days' time to which B consents. This is void and B can sue A at once notwithstanding his promise.

65. Impossible.—A promise to do something which in the nature of things is either physically or legally impossible will not support a contract. It is not a sufficient excuse, if it is only extremely difficult of performance, but it must be absolutely impossible from the *nature* of *things*. The reason of this is that the promisee could not have expected the promisor to fulfill such an agreement and hence making the contract was sheer folly which the law will not sanction.

66. Moral.—A moral consideration is not of itself sufficient to support a contract. However much every honest man will feel obliged to fulfill his moral obligations, yet the law does not deem it its duty to compel him to do so. A moral obligation to pay money or to perform a legal act is, however, a good consideration if followed by an expressed promise to do so, if there was at one time a legal obligation which is not now enforcible on account of the interference of some rule of law. Thus, an expressed promise to pay a debt contracted during infancy is upheld and an expressed promise to pay a debt barred by the Statute of limitations or bankruptcy is good without further consideration because it is a moral consideration based on what was once a legal obligation and this legal obligation is not enforcible because of the interference of a rule of law.

An adult son, being sick and destitute among strangers became indebted for care. His father afterwards promised to pay this account. This being merely a moral obligation on the part of the father, it is not enforcible against him. Had the promise been made before the service had been rendered, it would have been binding on the father.

67. Executed.—When the consideration has already been rendered voluntarily and not at the request of the other party it is said to be a past or executed consideration. A promise made in consideration of a service or promise already received or for an act of forbearance for which there is no expressed or implied promise to pay at the time is not a sufficient consideration on which to base a later contract.

Thus a creditor forbears to bring an action against his debtor and this proves of advantage to the debtor, yet it is not sufficient to support a later promise to pay for the advantage.

None can make himself creditor of another against his will. For the debtor may have certain reasons for wishing to settle with one rather than another. So where one makes a voluntary payment for another the law will not imply the promise of the debtor to repay it.

Where one knowingly accepts a voluntary service, makes no objection and retains its benefits when he could have refused them the law will imply his previous request for it.

An infant was sent to school in want of clothes which were supplied him. He returned home and showed them to his father who allowed him to keep them. The father afterwards promised to pay the bill. He was held liable for retaining the benefits when he could have rejected them his previous request was implied.

68. Illegal.—A promise to do that which the law forbids will not be held good. Were the law to do so it would be lending its aid to its own violation.

Thus, a contract to sell liquor without a license when the law requires one, is illegal.

69. Lack of Consideration.—In business, many cases have arisen in which the parties to a contract evidently concluded they had provided for a consideration when there was none either in reality or in law.

A owes B $100 due to-day. B, fearing that A will not be able to meet the payment, offers to take $90 and give a receipt in full of the account. Such a payment would not release A from payment of the balance. There is no consideration for the release. If the debt were not yet due and they settle for $90 because of the advance payment, it will be upheld; or if there was a dispute as to the amount due they could compromise for less than B claimed, and it would be a complete discharge of the debt.

The performance of or the agreement to perform, what the promisor is already bound by law or contract to do for the promisee can be no consideration in a later contract.

A owed B $293.07 on a note due in six months from date. Three years later the note being still unpaid, A sent B a check for $150.00 and in the body of the check wrote, "In full of all notes and obligations to date." In the letter which accompanied the check, he stated that he tendered this amount in full of all his obligations to B. B retained the check, sent a receipt "on account," sued for the balance and got judgment. *See 49 N. E. Rep. 1079, 70 N. W. Rep. 552 and 757 Ill. 531.*

A was hired by B for six months. At the end of one month A was discharged for alleged incompetency and in the letter dismissing him was a check for $75, one month's salary. In the check was written, "In full for services." A retained the check and sued the firm for breach of contract. It was held that a retention of the check was a bar to his claim. *29 S. E. Rep. 943.*

The difference between the above cases is, in the first one there was no dispute as to the amount due and in the second case there was a difference of opinion.

70. Failure of Consideration.—Where the consideration which at the time of contracting was supposed to be valuable but as a matter of fact was utterly worthless, the contract is void and money paid thereon may be recovered. A distinction should be noticed here that a mere failure to receive any benefit from the thing received is not sufficient to invalidate the contract.

Thus, you might sell A a patent right, which proves to be invalid, and again you might sell him a valid patent right to an article out of which you could make no money.

71. Gifts are not presumed. A naked promise to make a gift cannot be enforced. If the gift has passed, it becomes an executed contract and so far as the parties are concerned, it will stand. The question is often raised among relatives.

CHAPTER VIII.

SUBJECT MATTER.

- SUBJECT MATTER.
  - I. What may Be.
  - II. What Cannot Be, Because Agreement Is;—
    - 1. Impolitic.
      - *a.* In general restraint of trade.
      - *b.* In general restraint of marriage.
      - *c.* Obstructive of public justice.
    - 2. Immoral.
      - *a.* Wagers.
      - *b.* Sunday desecration.
    - 3. Fraudulent.
      - *a.* As to one party.
      - *b.* As to third parties.
    - 4. To commit a civil wrong.
    - 5. To commit a crime.

72. Definition.—*Subject Matter* is the thing agreed to be done or to be left undone.

73. What May be Subject Matter.—The general rule is that one may contract to do or omit to do anything that is in the nature of things possible. There are, as we shall see, exceptions to this rule and as these are far less numerous than the cases falling within the rule it will be simpler to enumerate and classify the subjects prohibited than those allowed.

74. What Cannot be Subject Matter.—The law will not permit certain things to be subjects of contracts because they are,—(1) Impolitic, or opposed to the welfare and progress of the community; (2) Immoral, or those tending to corrupt the good morals of the parties or community; (3) Fraudulent; (4) Agreements to commit a civil wrong; (5) Agreements to commit a crime or some act specially prohibited by law.

75. Contracts In General Restraint of Trade.—Although valid in every other respect if the fulfillment of a contract would operate in any

way to prevent one or both of the parties or an outsider from engaging in trade at all or in trade of a particular kind, the law deems it pernicious and it is void. The law looks with favor upon trade and therefore fosters it, and views with a jealous eye any restraint that parties may seek to place upon it. An agreement for partial restraint will, if reasonable, be sustained, but its unreasonableness will always be presumed and its reasonableness must be shown. What is reasonable must be determined by the circumstances of each case.

A, a retail dry goods merchant of Chicago, sells to B his stock of goods and good will and agrees not to engage in the retail dry goods business anywhere in the State of Illinois for five years. This is evidently an unreasonable restraint and will not be upheld. Had it been a wholesale business and his trade extended over the whole state then it would not be an unreasonable restriction.

76. Contracts in General Restraint of Marriage.—For a like reason contracts placing a general restraint upon marriage are void. Examples of this are frequently seen where a father leaves a bequest to his daughter on condition that she never marries. This is void, but if the condition be that she do not marry until she is of age it is valid because this tends to protect her from her own rashness. A bequest left by a husband to his widow on condition that she do not marry again has been held to be reasonable and hence valid, she having been married once. A marriage brokerage contract being an agreement to negotiate a marriage for a consideration is void and money paid thereon may be recovered.

77. Contracts for Obstructing Public Justice.—Good government is deemed an absolute essential for the welfare of the community, and hence any agreement by which the aims of justice may be thwarted is void on the ground of public policy.

An agreement to suppress the evidence in a criminal case, or withdraw from the prosecution of it, is void. So is an agreement by a legislator to use his influence to secure the passage of a certain act, or an argeement to disclose state secrets. No agreement that is opposed to the policy of the law will be enforced.

78. Wagers.—All contracts of the character of a wager, are void. They were not void by the common law, but have been made so by most if not all the statutes, and in some states money so lost may be recovered. The United States government has done what it could to aid the states in this regard and has forbidden the use of the mails by lotteries.

79. Sunday Desecration.—The old English common law was very strict concerning the proper observance of Sunday. It forbade all kinds of merchandising on that day and all labor except works of necessity or charity under penalty. This law has been substantially re-enacted by many of our states, but generally the rule has been much relaxed. Some go so far as to make void any contract if it be made on Sunday, but the greater number simply refuse to permit the courts to enforce a contract, the fulfilling of which would violate the Sunday statute.

"Sunday shall include the time from midnight to midnight. Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by any amusement or diversion on Sunday, shall be fined not exceeding $25. This section shall not be construed to prevent watermen and railroad companies from landing their passengers, or watermen from loading and unloading their cargoes, or ferrymen from carrying over the water travelers and persons moving their families, on the first day of the week, nor to prevent the due exercise of the rights of conscience by whomever thinks proper to keep any other day as a Sabbath." *Extracts from Illinois statutes.*

80. Fraud.—It is said that "the law abhors fraud," and certainly it will use its utmost endeavors to ferret out and thwart its object. The fraud in an agreement may be perpetrated (1) by one of the parties upon the other, or (2) by one or both of the parties upon a third party.

81. Fraud by One Party upon the Other.—When one party is induced to enter into a contract through the fraudulent representations of the other, the contract is voidable at the option of the injured party. No one can take advantage of his own wrong or fraud to avoid a contract. When both parties have been equally guilty of fraud, neither can obtain relief, but the law will leave them where it finds them. Often when there exists a confidential relation between the parties, a mere silence will amount to a misrepresentation or fraud upon the other party. In an executed contract into which fraud has entered, the injured party may rescind the contract, and return whatever benefit he may have received within a reasonable time after the discovery of the fraud. (See Sec. 56.)

82. Fraudulent Agreement to the Injury of Third Persons.—Any contract, the performance of which would defraud a third person, though valid as between the parties themselves, is void at the instance of such third person. One of the most frequent cases of this is selling personal property but retaining the possession thereof.

This acts as a fraud upon creditors who, ignorant of the sale, and seeing the property still in the debtor's possession, extend a larger credit to him on account of it. They have a right to have the sale set aside and the property applied in satisfaction of their claims.

Another case is that of adebtor who, seeing himself about to fail, with a view to defrauding his creditors, makes a sale to a friend who has knowledge of the object of the sale. Even though full value be given, yet the creditors can have the sale set aside or declared void, and the proceeds applied in payment of their claims. The friend may in this way lose the value he has paid, but it is no more than he deserves for attempting to defraud others.

It is not, however, considered a fraud upon other creditors for a failing debtor to make an assignment, and state that certain creditors must first be paid. This is called "assigning with preferred creditors."

83. Contracts Specially Forbidden by Statute.—The national and the different state statutes forbid certain things to be subjects of contract. Thus most of the states have by statutes prohibited contracts to pay more than a certain per cent of interest.

It seems almost superfluous to add that an agreement to commit a crime is void, neither can one make a valid agreement to commit a civil wrong, such as to print a libel or commit a trespass.

84. Effect.—The question naturally arises what is the effect when parties have agreed to that which cannot be legal subject matter, or in other words, to a contract that is void, or at best voidable. No general rule can be laid down to cover all cases, for the courts will in many cases make such order as will be just; but usually if the contract be an executory one it will be as if never made. If it be an executed one money paid can often be recovered, and especially is this the case where the party seeking to recover has been defrauded, but where the parties have been equally culpable the law will do nothing for either but will leave them where it finds them. When the contract is void on account of a statutory provision the statute usually provides its own penalty, as in the case of usury.

CHAPTER IX.

REMEDIES.

85. Definition.—It has long been the boast of our law that under it there is provided a redress for every wrong. The legal means which the law uses for the purpose are called its remedies. In case the wrong is a public one, it is called a crime, and its punishment is provided for by the criminal law. It is however, particularly to wrongs against the individual that this work is addressed. The remedies provided for this purpose are termed *civil remedies*. These are always secured through the formality of "a suit at law," for it is a maxim of law, "That no man shall be condemned unheard," or "Every man has his day in court."

86. Legal Steps.—The following are the formal steps to be taken by a creditor for realizing on an account against his debtor:

I. Summons.
II. Trial.
III. Judgment.
IV. Execution.
V. Levy.
VI. Sale.

87. Summons.—The first step is to secure from the clerk of the court a summons, and have it served upon the defendant. This is in effect a notice to him of the plaintiff's demand, and the day, place and hour of trial, that he may have the opportunity of being present and of making his defense.

88. The Trial is conducted by a regular and well understood code of rules, each party being allowed at the proper time to offer evidence in his own behalf. It will be well for the student to understand that the plaintiff must prove his case by a preponderance of the evidence. The debtor is not presumed to owe the debt, and therefore, the creditor (plaintiff) must overcome this presumption by producing

more evidence that he does owe it than the defendant produces that he does not.

89. Judgment.—If the case be heard by a jury their decision is called a "verdict." The verdict, when "entered" is called a judgment and becomes a part of the written records of the court. This judgment varies according to the remedy provided for the wrong which the evidence shows to have been done. When a judgment is entered in a "*court of record*" it usually becomes a lien upon all real estate owned by the debtor in the county. So far the remedy has proved to be of little satisfaction to the creditor, for though he has a judgment, he seems as far as ever from securing satisfaction in the way of money. But these steps have all been necessary that the agencies of the law might make no error in their procedure, for to do so would be quite as great a wrong against the debtor as not to provide any remedy for the creditor. So far the steps taken have been to fix the liability with certainty, the remaining steps will be taken for the purpose of realizing upon that established liability.

90. Execution.—This is an order issued by the court to its executive officer (constable or sheriff), directing him to seize the property of the debtor and convert it into cash, that the judgment may be paid. The execution is usually first *served* upon the debtor, that is, read to him, and a demand made upon him by the officer for either cash or property with which to satisfy it.

91. Levy.—In case the debtor refuses or neglects to turn out property in satisfaction of the execution when it is *served* upon him, the officer may seize any such property he can find belonging to the debtor. This is called "making a levy." Property so seized is, after being advertised according to law, exposed for sale, usually by auction to the highest bidder. The proceeds are first applied in satisfaction of the costs and then to the claim itself, after which, anything remaining is turned over to the debtor.

92. Exemptions.—Not all property owned by the debtor is subject to levy under an execution. The several states have passed statutes called "exemption laws," by the terms of which certain property of certain persons is vouchsafed to them. This is to prevent the individual from being so deprived of the necessities of life, or of resources by which these necessities may be obtained, as to be in danger of becoming a public charge. As a rule, heads of families are

the most favored class in this regard. As this is a matter of statutory regulation, the student should consult the statutes of his own state for further details. (See page 242.)

93. Garnishment.—The debtor may have no property subject to execution, but another may owe him on account, note or other form of indebtedness. This person may be called in and made to testify as to the amount of such indebtedness. A judgment will then be entered against him for such amount as may be due, and in favor of the plaintiff. This is called "garnisheeing the debt of another."

94. Replevin.—When a party fails to perform that which he has contracted to do, the law, as we have seen, gives to the injured party a redress. This redress is in nearly all cases a *money damage*. The law does not usually compel a party to literally perform his contract, neither can he, as a rule, be imprisoned for not doing so. There are cases, however, when the law does not deem a money compensation a just equivalent. One of these is the unlawful taking and detaining of the goods of another. The remedy for this is an action of *replevin*. The executive officer of the court takes possession of the goods, and if after trial the judgment is in favor of the plaintiff, the actual goods are delivered to him; but if in favor of the defendant, the goods are returned to him. The scope of this action has been generally much enlarged by statute, until now it embraces all cases of *unlawful detention* of the goods of another, whether the original taking was lawful or not. It is certainly, where applicable, a wholesome remedy, and without it the law would in such cases come far short of giving complete redress.

95. Attachment.—In many cases, before the plaintiff could comply with the long formalities of a suit at law, and then secure an execution, the defendant would have put all property out of his hands, or would be out of the state. In such cases the court will issue an *attachment*. This is in effect reversing the order of the steps, bringing the execution first, after which comes the trial, judgment, etc. In Illinois there are nine statutory grounds, one of which must be sworn to by the plaintiff or his agent, before he can have the benefits of this action. It is a grave thing to deprive a man of his property before it is legally determined that he is indebted to the plaintiff.

In most states the plaintiff in an attachment case must give a bond before the writ will issue. The bond is conditioned that the

plaintiff will reimburse the defendant for any loss occurring to him should the attachment prove to be unlawfully sued out.

96. Injunction.—This may be said to be a negative remedy. It is rather to prevent an injury than to right one already done. If A is about to do that which would be an irreparable injury to B, he can secure an *injunction* against A. This is the order of the court restraining A from doing the act.

97. Specific Performance.—This is perhaps the only genuine case where the law will compel a party to literally perform his contract. It will not lie for every contract. It will lie only in a few well defined cases, and these usually relate to real estate.

CHAPTER X.

DEFENSES.

98. Meaning.—While it may be true that the defendant has not fulfilled his contract in every particular, or not at all, yet there may be some legal excuse for his failure to do so. Any reasons which he may offer, and which the law will accept as relieving him from the consequences of his failure, are called his *defenses*.

The principal defenses are: (1) Statute of Frauds; (2) Statute of Limitations; (3) Tender; (4) Payment; (5) Performance; (6) Forfeiture; (7) Set off; (8) Recoupment.

STATUTE OF FRAUDS.

99. The Statute of Frauds was a famous English statute, passed in the reign of Charles II., and since substantially re-enacted in the statutes of most, if not all the states. It provided that certain classes of contracts must be in writing in order to be valid. It is, in fact, a question of evidence. The statute forbids any oral testimony to be introduced to prove the contract. If it be not in writing, so that the contract itself can be introduced, the plaintiff is simply unable to make out a case, which he must do. The defendant then objects to all oral evidence, and wins his point, not by the strength of his own defense, but by the weakness of the plaintiff's case. To

contracts falling within the list it simply adds another *essential* to the four already considered, but as the question is only raised as a defense, it is considered in that connection here. It was called the Statute of Frauds because the object of requiring certain contracts to be in writing was to prevent frauds and perjuries.

The statute provides that the following classes of contracts, among others, must be in writing:

I. Contracts for the sale of any interest in lands.

II. Leases of land, for more than one year (with certain exceptions).

III. Contracts by their terms not to be performed within one year.

IV. Contracts made upon consideration of marriage, except mutual promises of marriage.

V. Contracts to answer for the debt, default or miscarriage of another.

VI. Contracts for the sale of goods, chattels or choses in action for the price of $50 or more, unless:

1st. The buyer receives a part of the thing purchased;

2d. The buyer pays part of the purchase price;

3d. The sale be by auction.

100. Contracts for the Sale of any Interests in Land.—The sale of lands was always considered of much importance, and hence it is not surprising that this was made an important feature of this statute. Indeed under the American system of registering titles, the conveyance itself must of necessity be evidenced by writing. The statute includes not only the sale (the deed) itself, but the contract to sell as well.

A, in the presence of witnesses, offers to sell to B a certain piece of real estate for a certain price. B accepts the offer. They agree to meet on a future day, when B is to pay the purchase price and A is to deliver the deed of transfer. On the day set they meet, but A, having changed his mind, refuses to transfer the property. B has no remedy.

101. Leases of Land for more than one year.[1]—Long verbal leases would certainly lend an inducement to fraud, and many perjuries would result from relying on the memory of witnesses for the provisions of such a contract. The statutes of the states are not all uniform as to the maximum verbal lease permitted, some allow two and others three years.

[1] Arizonia, Alabama, California, Colorado, Delaware, Idaho, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, Oregon, Rhode Island, Texas, Virginia, West Virginia, Wisconsin, Wyoming.

It becomes an important question whether the year referred to is to begin at the time of making the lease or on the day it goes into operation.

The language of the English Statute in reference to this section was "From the making thereof," and this langauge has been copied in many of the states. In these latter states the year counts from the day of making the lease.[1] When this phrase or its equivalent has not been used in the statute, the year is to be considered as referring to the duration of the term.[2]

102. Contracts by Their Terms Not to Be Performed within One Year from the Making thereof.—There is certainly no provision of this statute more salutary than this. Experience has shown the danger that exists in allowing transactions of a remote date to rest solely on the testimony of witnesses. They may not at the time have had a clear understanding of the agreement, and even though they had, they may now honestly differ in their recollections of it. It may seem that sometimes it works a hardship, but it must be remembered that it is a part of the law which every one is supposed to know, and he who neglects to take advantage of its provisions has no one to blame.

A verbally contracts in June with B for his services for one year from the first of the following July. This is not binding upon either, for by its terms it is not to be performed within a year.

A part performance, such as B working for the first four months of the term will not relieve the parties from the provisions of the statute. B can however, collect for the value of the services actually rendered, and if he perform his part entirely he can collect the entire consideration previously agreed upon.

It will be observed that the contract must be one that is not "By its terms" to be performed within one year. If it *may be* performed within a year, but is prolonged beyond that term, the statute does not apply.

103. Contracts Made upon Consideration of Marriage, except Mutual Promises of Marriage.—This section has reference more particularly to a custom more common formerly than now. It was an agreement made by the parent, guardian or relative of the prospective bride with the groom, by which he or they were to settle a certain amount of

[1] Illinois, New Jersey, Massachusetts, Pennsylvania.
[2] Colorado, Georgia, Iowa, New York.

property upon her to hold in her own right. This agreement was made of course in consideration of marriage, and this statute requires it and all similar contracts to be written. Mutual promises of marriage, however, are not included in the provisions of the statute.

104. Contracts to Answer for the Debt, Default or Miscarriage of Another.—Perhaps no provision of this statute is more frequently violated than this. Often the contract is made verbally and fulfilled, the parties never dreaming that they could not have been compelled to fulfill it or suffer the consequences. The language of the statute describes a guaranty, and from the phraseology, "Debt, default or miscarriage" it will be seen to include not only cases arising out of contract, but out of tort as well.

A and B entering C's store, B says to C, "Let A have $50 worth of goods, and if he does not pay for them I will." This is not valid unless in writing, for it is a contract to answer for the debt of another. Had B said, "Let A have $50 worth of goods and I will pay for them;" this would have been good, though not in writing, for it is B's debt, and not a contract to answer for the debt of another.

It matters not in what words the contract be stated if it be a *conditional* contract, that is, to pay if another does not, then it comes within the meaning of the statute.

A owes B a debt, the exact amount of which is not determined. C for a consideration agrees to pay this debt. This need not be in writing, for it is an absolute agreement, and not conditional.

A secures a position of trust in a bank and gives B as a reference as to his honesty. B says that he will guarantee the faithful performance of A's duties. This will not be binding unless in writing.

The A Co., a corporation, had owed B for some time and at B's suggestion, C, D and E, all directors of the A Co., gave their joint note to B for the indebtedness. B was not able to collect the note. Why? *26 So. Rep. 981.*

105. Contracts for the sale of Goods, Chattels or Things in Action.—This provision of the old English statute has not always been re-enacted by the states, for change of possession of personal property usually follows quickly upon a change of its ownership. Many states have, however, adopted it, but the amount of the sale, which may be verbal, varies in the different states. In Illinois, and perhaps one or two other states, this section has not been enacted, and hence does not apply there. In Maine, New Jersey, Missouri and Arkansas the amount stated is $30.00. In Iowa and Florida a contract for sale of personal property for any amount must be written. (See sections 291 and 294.)

CHAPTER XI.

STATUTE OF LIMITATIONS.

106. Meaning.—Statutes of limitations proceed upon the maxim that legal rights should be asserted within a reasonable time, and beyond that the law will not lend its aid to the injured party to secure his rights. They have often been called statutes of repose, for after a certain time the action is at rest so far as the law is concerned, though the moral obligation still exists.

The common law fixed no limits within which an action might be brought, so the matter has been regulated by statutes. When the time is past in which an action may be brought, it is said to be "Barred by the statute of limitations," or "outlawed."

TABLE OF LIMITATIONS.

STATES.	Open Accounts.	Contracts in Writing.	Judgments.	STATES.	Open Accounts.	Contracts in Writing.	Judgments.
Alabama	3	6	20	Nebraska	4	5	5
Arizona	3	5	5	Nevada	2	4	5
Arkansas	3	5	10	New Hampshire	6	6	20
California	2	4	5	New Jersey	6	6	20
Colorado	6	6	6	New Mexico	4	6	7
Connecticut	6	6	....	New York	6	6	20
Delaware	3	6	20	North Carolina	3	3	10
District of Columbia	3	3	....	North Dakota	6	6	20
Florida	2	5	20	Ohio	6	15	21
Georgia	4	6	7	Oklahoma	3	5	5
Idaho	4	5	6	Oregon	6	6	10
Illinois	5	10	20	Pennsylvania	6	6	20
Indiana	6	10	20	Rhode Island	6	6	20
Iowa	5	10	20	South Carolina	6	6	20
Kansas	3	5	5	South Dakota	6	6	20
Kentucky	2	5	15	Tennessee	6	6	10
Louisiana	3	5	10	Texas	2	4	10
Maine	6	6	20	Utah	2	4	5
Maryland	3	3	12	Vermont	6	6	8
Massachusetts	6	6	20	Virginia	2	5	10
Michigan	6	6	10	Washington	3	6	6
Minnesota	6	6	10	West Virginia	5	10	10
Mississippi	3	6	7	Wisconsin	6	6	20
Missouri	5	10	20	Wyoming	8	5	5
Montana	5	8	10				

107. When the Time Begins to Run.—In general the time mentioned in the statute begins to run from the very first day the action could have been brought. And this would be the case even though the party did not know of his right of action until long after. In a running account, or note on which there have been payments, the time begins at the last payment. The payment of interest will have the effect of keeping the debt alive. By the English statute the time begins to run from the date of a note payable on demand, but the statutes of most states have provided for this case.

108. Saving Clause.—There are certain reasons which the law will recognize as valid excuses for not bringing an action within the prescribed time. These are said to take the case out of the statute. The ones usually recognized are infancy, coverture, insanity, imprisonment and absence from the state. They are said to be "disabilities," and the person successfully pleading one of them is said to be laboring under a disability.

As a rule, when the disability exists at the time the action accrues, the statute does not begin to run until the disability has been removed. The state statutes differ as to the length of time allowed for bringing the action after the disability has been removed. The old English statute allowed six years. In many states the statute will not be suspended by a disability intervening after the action accrues. The five disabilities mentioned above extend to the plaintiff, but only the last one, absence from the state, also applies to the defendant.

A of Chicago owes B of Chicago on a note. When the note falls due A is abroad and remains out of the state for a year. The statute does not begin to run until he returns.

109. Acts and Admissions That Revive the Claim.—The object of the statute is to protect the debtor against claims so stale that the evidence to rebut them might not now be found. It also proceeds on the supposition that the debtor has paid the claim. In case, therefore, there is an expressed promise to pay the debt, the statute will begin to run again from the day of such promise. The English law did not require this promise to be in writing, but the statutes of many states do so require it.[1] A voluntary payment by the debtor, being in the nature of an acknowledgment of the debt, and showing

[1] California, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Dakota, Utah, Vermont, Washington, West Virginia, Wyoming.

an intention to pay it, will revive a debt even though it be already barred.

It should be observed that this statute must be specially offered as a defense to an action, and a desire shown to take advantage of it, for the courts will not, of their own motion, take notice that the claim ought not to be recovered on, or is barred.

110. Statutes Vary in Different States.—The length of time within which a suit must be brought, varies in the different states, and this frequently results in suddenly leaving a creditor without remedy. For instance, A owes B an open account in the state of Michigan, where the statute is six years. The account being two and a half years old, B feels secure that he yet has three and a half years within which to bring his action, but suddenly A moves to California, where the limit is two years, which is already past. B is without remedy. On the other hand, these conditions are sometimes reversed, in which case it is in favor of the creditor. But some few states have denied him this extension, and declare that the law of the state where a contract is made (*lex contractu*) and not where it is sought to be enforced (*lex fori*) shall govern. In other words, if the debt is barred where it was made, it is also barred where it is sought to be enforced.

TENDER.

111. Meaning.—To tender means to offer, and it is in this sense that the term is used here. It is an offer made by a debtor to deliver something to a creditor that he is obligated to deliver. Not every offer however, will operate as a legal defense. In order to be a *legal tender*, that is, one that the law will recognize as such, there are certain conditions as to what, where, when and how, that must be observed.

112. Money.—When the obligation is to pay a sum of money, either on a contract or as damages for some wrongful act, the tender must be made of certain kinds of money. The constitution of the United States gives to congress alone the right to say what money can be used as legal tender. In pursuance of this it has provided that the following moneys may be so used:

I. Gold coin and silver dollars in any amount.

II. Silver coins smaller than one dollar in amounts not exceeding ten dollars.

III. Coppers and nickel coins up to twenty-five cents.

IV. Greenbacks for any amount and for any debt except duties and interest on the public debt.

V. Treasury notes in any amount.

One of the most common forms of currency, national bank notes, is not included in this list, for they have never been recognized by congress as legal tender. If, however, they are tendered, and no objection is offered to them on this account, and the tender is otherwise well made, it will be legal. Gold and silver certificates are not legal tender if objected to.

113. Chattels.—The obligation may not require the payment of money, but the delivery of a chattel, in which event it may become necessary to make a tender of the chattel as a condition precedent to bringing an action for its price. Or the debtor may wish to tender the property mentioned in his chattel note in order to free himself from its care. The whole quantity must be tendered and not a part. The offer must be unconditional, and made in such a manner as to leave nothing for the creditor to do but to accept the property and thus to vest the title in himself.

114. Manner of Making Tender.—When money is to be tendered, not only certain kinds of money should be used, but the exact amount, or at least if more is tendered no change should be demanded, for the offer would then be conditional. With this condition the creditor might not be able to comply. If the contract specifies the place of payment tender may be made there, but if no place is mentioned the debtor should seek the creditor and make tender to him or his duly authorized agent. The only condition that can be exacted by the debtor is when the creditor holds a note for the amount he can insist on its return. Unless the creditor waives it, the actual money must be produced and offered, and it is not sufficient to signify a willingness and readiness to pay.

115. Effect of Tender.—When the tender is one of money, and it is legally made, it does not discharge the debtor, but it relieves him from the payment of further interest, and from the costs of any subsequent action that may be brought against him on the claim. In order to keep his tender good, and to save himself the benefits of it as a defense, the debtor must be in readiness at all times to produce and pay the amount on demand.

In case the debtor is sued, he pleads a legal tender, and brings the money into court. The burden lies on him to show that he made a

legal tender and has kept it good. The plaintiff may secure a judgment against the defendant but if the tender was well made the judgment will not include the costs of the action as would be the case if no tender had been made.

The effect of a legal tender of chattels is to deliver them, although the possession may still remain with the debtor, who holds them as a bailee. A debt then, payable in chattels is fully paid and discharged by a legal tender of those chattels.

A and B differ as to the amount A owes B, and A tenders the amount he admits as due, and B refuses it. B then brings an action against A. If he does not get a judgment for more than A tendered him he (B) must pay the costs.

CHAPTER XII.

PAYMENT.

116. What is Payment. — If the agreement is to pay a debt in money, it can be made in any of the moneys which are considered legal tender, and indeed if accepted as payment with a full knowledge of what it is, any money will be considered by the law as payment. If the creditor insists he need not accept any money except legal tender.

117. Payment by Mail.—It should be borne in mind that if the contract is silent as to where the payment is to be made, it is the duty of the debtor to seek the creditor and make his payment to him. The creditor is not in such cases obliged to make a demand before bringing an action. If the creditor requests the debtor to send the money to him by any certain method, as by mail or registered letter, and the debtor follows his instructions strictly, then it is at the creditor's risk. It is payment though lost. If, on the other hand, the debtor, to save himself the trouble of seeking the creditor, and without instructions sends the money by mail or other means, he is responsible for its receipt, and must suffer any loss.

118. Payment by Note.—The taking of the debtor's own note for an account is not in general, payment of that account, for the creditor may return the note and sue upon the account. It may,

however, have the effect of postponing the date of payment until the note would fall due. If, however, there is indicated a clear intention to accept the note as payment, it must be so considered, but this intention must be unmistakable.

119. In the Sale of a Chattel a third person's note or acceptance will be regarded as payment. It is in the nature of giving one chattel for another. If it be for a pre-existing debt, the weight of authorities is that it will not be regarded as payment.

A purchases of B a bill of goods and gives in payment, without indorsement, C's note, made payable to bearer. Before maturity, C becomes insolvent. What are B's rights?

If this note had been given for a pre-existing debt, what rights would B have?

It should be observed that taking a note of a third person as collateral security does not operate as payment.

120. Payment by Check. — The acceptance of a check, whether that of debtor or of third person, is payment, unless it be dishonored when properly presented.

121. Part Payment.—As a general rule when the exact amount of the indebtedness is known and admitted, a part payment will not operate as a discharge of the whole, even though the creditor agrees to accept the part in satisfaction of the whole. There must be some legal benefit or legal possibility of a benefit to the creditor sufficient to amount to a consideration for his promise to release the residue. Neither does the giving of a receipt change this, for it is a well-known principle of law that a receipt may be disputed or explained by parol evidence.

If a piece of personal property be accepted in addition to the part payment of money, it will operate as a discharge of the whole, though the value of the chattel may appear to be an inadequate consideration. So if the debt is not yet due, or the exact amount of it is in dispute, acceptance of a less sum than that claimed by the creditor will discharge the obligation.

A mutual agreement by the creditors of an insolvent to accept a less sum than their respective claims is binding. The promise of one is a consideration for that of the others. (See sec. 69.)

122. To Whom Payment May Be Made. — Payment if made to the creditor is of course valid. It can be made to one of several partners when the indebtedness is to the partnership. It may also

be made to the creditor's authorized agent, and one who is found in possession of the creditor's books of account, and apparently in possession of his affairs, may give a valid release.

123. Application of Payment.—When there are several debts due the creditor from the debtor, and a payment is made, the question arises, to which debt must the payment be applied. It becomes exceedingly important when some of the bills are barred by the statute of limitations and others not. The rule is that at the time of payment the debtor may direct to which account he wishes it applied. The creditor is not obliged to receive less than the whole of any account, but if he does receive it he must apply it as the debtor directs. The debtor failing to direct the application of his payment, the creditor may apply it as he chooses. He may even apply it to a debt already barred, but it will not revive the balance. He cannot apply it, however, to an account growing out of an illegal transaction, and then claim on the legal obligations.

PERFORMANCE.

124. Meaning.—The defendant may plead that he has performed his contract entirely, or as far as required before the plaintiff should perform his part. In order to be a good defense the performance must conform essentially to the material conditions of the contract as regards time, place and manner. Formerly the law required a strict compliance in all respects, but as this rule often worked a great hardship, it has been much relaxed.

125. Time of Performance.—Whether the time of performance or non-performance of a contract is an essential element will depend upon the circumstances of the case. It may be so important that the injured party may legally refuse to accept any performance at a later day; in other words, he may rescind the contract; and in other cases he may be justified in accepting performance and in claiming a reduction of his part for lack of promptness in the other party. If time can be shown to be an unimportant feature in any case, a performance that is substantially on time will be a valid defense.

A lady ordered a dress from a store and at the time of ordering stated that she wished it for a certain gathering to be held on the following Saturday evening. The order was accepted on these terms, but the garment was not delivered till two days after the date specified. The lady then refused to accept the dress.

126. Time, How Counted. — When the time is expressed in months, calendar months are meant. It is also a general rule that the day the contract is made is not to be counted, but the day of performance is a part of the time. When the last day of performance falls on Sunday or a holiday, the party has the succeeding day in which to perform.

127. Part Performance.—When the contract is for a certain term of service, or for a certain quantity of personal property, and there is an inability to more than partially fulfill the contract, it does not render it all void. The servant who has thus rendered only a portion of his services may recover *quantum meruit*, that is what he merits, less any damages his failure may have caused the other party. In the case of the delivery of only a portion of the personal property, recovery may be had *quantum valebat*, that is for its value, less any damage caused the other party.

In contracts for personal service there is always an implied provision that health permits.

FORFEITURE.

128. Explanation.—Often in making contracts the parties stipulate that in case either party fails to perform his part of the contract, he shall forfeit to the other a certain stipulated sum. This provision will not usually be upheld by the courts, for it is a maxim of the law that "The law abhors a forfeiture." It is deemed sufficient that the injured party be allowed his damages actually suffered, and not that the other be punished for his failure.

This rule does not prohibit the parties from agreeing beforehand upon the amount of damages each would suffer upon the failure of the other, called *liquidated damages*. But it must appear to be an honest agreement made with this end in view, and not in any sense a forfeiture.

SET-OFF.

129. Set-Off as a Defense. — When suit is brought against a debtor he may plead that he has not paid the debt because he has a claim against the creditor which is unpaid. It is often called a *counter claim*. Litigation is often much simplified in this manner, for the validity of the claims of each can be tested in the same suit. He who has the largest valid claim against the other will get a judg-

ment against the other for the difference. The debt sought to be recovered, and that to be set off, must be mutual, and due in the same right. A joint debt cannot be set off against a separate one, nor vice versa. The defense of set-off is allowed for the benefit of the defendant, hence he can avail himself of it, or bring a separate action for his claim, as he may choose.

RECOUPMENT.

130. Recoupment as a Defense.—Recoupment is used as a defense in the same manner as set-off. It differs from set-off in that the two claims must arise out of the same transaction, while in set-off such need not be the case. Then in set-off it is debt against debt, but recoupment is a reduction of damages in an action for breach of warranty or defect in performance. It is withholding a discount claimed to be due for a defect.

A sold B a horse and warranted it to be sound in every particular. The consideration was to be $100, due in three months. The horse proved to be unsound, and B refused to pay the full consideration, and A sued him for it. B's defense was a breach of warranty. The jury gave A a verdict for $75. B's defense was recoupment. What would have been the effect if B had made a legal tender of $75 to A before the suit was brought?

CHAPTER XIII.

MISCELLANEOUS ITEMS.

131. Important Rule of Evidence.—It has been observed in section 96 that a trial is conducted according to a well-understood code of rules. Even the evidence that may be introduced is subjected to the careful scrutiny of the court, and none will be admitted either for or against except it be clearly legal. One of the most important rules of evidence is that "No parol evidence can be admitted to explain, vary or contradict that which is written." As a result of this rule, when two parties have made a contract and committed it to writing, that writing, when obtainable, is the only permissible proof of the contract. As a mere rule of evidence this knowledge is of little benefit to any but practicing attorneys, but when we come to

regard its effect it is of the greatest importance to all who make written contracts which they expect to enforce. In the light of this rule the student should be impressed that a written contract should state the agreement exactly, and without ambiguity, for by the instrument itself is the case won or lost. Evidence cannot be introduced, that while the contract says one thing something else was intended. Evidence may, however, be introduced to show that since the making of the written contract another agreement was made which practically annulled the former. In this there is nothing inconsistent with the idea that every man is presumed to have meant just what he said.

If there be in the contract a latent ambiguity, that is, one not apparent on its face, such for intance as a person's name, and there happens to be two of that name, the one actually meant may be ascertained by parol evidence.

A, a prominent person in a village, is solicited by B, a book agent, to subscribe for his book. The price of the book is $15.00, but B, wishing to have A's name head his list, orally agrees to let him have the book for $5.00, but for obvious reasons takes his name on a regular blank in which A agrees to pay $15.00, B claiming that he will make it right when he comes to deliver the book. The delivery is made by another who, standing on the written contract, insists on A paying $15.00. A is remediless, for he cannot introduce the oral contract.

132. Exception.—There is one important exception to this rule, an exception to which we have previously alluded. It is that of a receipt. Parol evidence is admitted to vary or contradict a receipt. Sometimes an instrument is both a contract and a receipt, but in this case the law carefully distinguishes between the two functions, and will admit parol evidence to dispute the receipt part but not the contract.

Another Rule of Evidence.—It is the law in most States that in a suit in which one of the parties sues or defends as the executor or administrator of a party deceased the other party thereto cannot testify. Business should therefore be conducted with this rule in view. The evidence should always be arranged so as to make proof of the indebtedness easy. For this reason a note is to be preferred to an open account, for the signature may be proved by third persons.

A owed B on a note. A payment of twenty dollars was endorsed on the note, but the endorsement was in B's handwriting. A died and B sued A's executor on the note which was outlawed if the endorsement was not allowed to extend the time. Had the endorsement been in A's handwriting the payment could have been proven. As it was it could not and B lost. *46 Atl. Rep. 51. 58 N. H. 201.*

133. Assignment.—The old rule of the common law was that a chose in action could not be assigned. It was supposed that to permit it would increase litigation, but this argument has long since been exploded, and now a person may sell and transfer almost any chose in action, subject to the debtor's right of set-off. Contracts may be assigned except when they are of a personal nature, such as for the services of a particular individual. When a contract is assigned and suit is brought by the assignee, it must be brought in the name of the assignor for the use of the assignee. This gives the defendant the opportunity to plead a set-off if he has one. The debtor should be immediately notified of the assignment of a chose in action, else he may pay the assignor. If he assents to the assignment, suit may in that case be brought in the name of the assignee.

On the grounds of public policy, a soldier is not permitted to assign his future pay or his pension, neither can a personal action, such as a right of action against a railway company for personal injuries be assigned, for this dies with the person. The assignment need not be formal, but a mere delivery of the evidence of indebtedness has been held as sufficient.

The assignee, *except in the case of negotiable paper*, takes no better title than the assignor had.

The usual form of assignment is about as follows: For value received I hereby sell, assign and set over to A B all my right, title and interest in and to—(here describe the thing assigned). Signed this — day of — A. D. 190—.
(Signed).

134. Non-Negotiable Paper. — A non-negotiable paper may be transferred by indorsement, the same as any other contract, but the taker is not protected to the same extent as the indorsee of a negotiable paper.

135. Alterations.—A party making any material change or alteration in a written contract, by erasing or adding to it, renders the contract absolutely void. He cannot even recover that which was his due on the original.

By the Negotiable Instrument law an innocent holder may enforce a negotiable paper according to its original tenor.

136. Bankruptcy and Insolvency Laws. — A bankruptcy law differs from an insolvency law in that the bankrupt is wholly discharged from all further liability, while the insolvent is not. By the constitution of the United States, congress is given the power to pass uniform laws of bankruptcy, and in accordance therewith three

different laws have been passed, and each almost immediately repealed. Many States have, therefore, felt compelled to take the matter in their own hands, and have passed bankruptcy laws, while nearly all have passed insolvency laws.

Under the decisions the State may only pass a bankruptcy law when there is no national bankrupt act in force. (See sec. 16.) There is also a difficulty in making the provisions of a State bankruptcy law applicable to creditors outside of the State. (See sec. 8.) The effect of this is that a State legislates against the interests of its own citizens, making them less favored creditors than the citizens of other States.

The greatest difficulty the States have had in passing these laws has been that provision of the national constitution which forbids the States to pass any law impairing the obligation of contracts.

For the provisions of an insolvency law the student should consult the statutes of his own State.

137. Accord and Satisfaction.—When there has been a breach of a contract on the part of one party the parties may agree on what the one at fault is required to do by way of settlement. If this agreement be fulfilled it is a complete discharge of the contract and no further action can be maintained on it. If, however, it be not carried out the aggrieved party may maintain an action for damages on the original contract, and if he can prove a greater damage than was agreed upon he can recover it.

PRACTICAL REVIEW.

I. A writes to B that he will take 100 barrels of apples at $4.00 per barrel. 1. Must B furnish the apples? 2. If B desires to furnish the apples, how soon must he accept?

II. A offers by letter to sell his house to B for $1,000. B replied by letter, "I accept, subject to your first putting the house in thorough repair." Is there or not a contract? And why?

III. A and B are intimate friends, living in a suburb of Chicago. A owes a bill at Field's. B being in Field's store, is asked if A is good for the bill. B, wishing to save A's credit, paid the bill for him, and on so informing A was thanked for his kindness. Can he collect it from A? *117 N. Y., 168.*

IV. A agreed to sell a horse to B, each supposing the price was agreed on. Before delivery it transpired that A thought the price was to be $175, while B thought it was to be $125. Was there a sale? Why? Suppose this misunderstanding was not disclosed until after delivery, what would be the rights of the parties?

V. In the above case, no delivery having been made, if B should write that he would split the difference, and should add "If I do not hear from you by return mail, I shall consider the horse mine." A gets the letter but does not reply. Is there a contract? Give reasons.

VI. A lady contracted to sing at a concert on a certain night. The night arriving she was too ill to appear. Is she liable for breach of contract? Why?

VII. A agrees to buy certain shares of stock from B, supposing them to be worth a premium. Before paying for them he learns they have fallen on the market. What are the rights of the parties?

VIII. A writes to B, saying that he will take 100 barrels of pork at $12 a barrel; B replies by letter the next day that he will ship the pork at that price; on this same day, after this letter is mailed, the price of pork suddenly rises over $12, and B telegraphs at once to A that he cannot let him have the pork at $12; the telegram reaches A before the letter. Is B bound to deliver the pork at $12 a barrel?

IX. A contracted to deliver a cargo of lumber on board a vessel within ten days. He began the delivery, but a sudden frost made it impossible to bring any more lumber from the mills by boats navigating the canal. For this reason the work was delayed twenty days. Is A liable, and why?

X. A agrees to sell and deliver to B goods of a certain kind. On the day named for the delivery, goods of that kind were not to be had. Can or not B recover from A? And why?

XI. A, in ignorance of the fact that B is an adjudged lunatic under guardianship, enters into a contract with him. Can B's guardian enforce the contract? Would your answer be different if B were a minor instead of a lunatic? Why?

XII. A, being detected in crime, agrees to and does sell and deliver to B, the prosecuting witness, a valuable watch, the consideration being that B is not to prosecute. Can A recover his watch? Why? If the watch had not been delivered, could B compel A to complete the sale? Why?

XIII. A telegraphs to B, a florist, to send him ten bouquets; the telegram delivered to B reads one hundred bouquets; B fills the order. For how many bouquets must A pay? Why?

XIV. A telegraphs to B to forward a carload of lumber to him at once; later he telegraphs again, withdrawing his order. The last message miscarries, and when it finally reaches B the lumber had been started. Is A liable?

XV. A agrees orally to purchase a house and lot of B at a certain stipulated price. They are to meet on a future day and complete the sale. Before the day mentioned B writes A that he will not make the sale at the price agreed upon. What remedy has A?

XVI. A, a minor, agrees to sell B a horse for $250. 1. Suppose before delivery A refuses to be bound. 2. Suppose delivery has been made and money paid when A insists on a recission. 3. Suppose that B sells the horse to C and then A rescinds. What are the rights of the parties in each case?

XVII. A, a butcher, buys of B five head of cattle, to be delivered on a certain day, but B fails to deliver the cattle. A claims damages for the breach and agrees with B to accept $25 in full satisfaction, but B does not pay it. Can A recover it? Can he recover any more?

XVIII. A in the presence of several persons orally hires B for one year from the following September first, at a yearly salary of $1800. B enters upon his employment and continues for seven months, when he is discharged through no fault of his own. Can he recover from A, and if so how much?

XIX. A owes B a sum of money. C., for a valuable consideration, agrees with A to pay his debt to B. Should this contract be in writing? And why?

XX. F sells property to G, intending to put the proceeds beyond reach of creditors. Can G, knowing all the facts, hold the property as against the creditors of F? Can he hold it as against F? Can he hold it as against F's creditors, if he had no knowledge of F's scheme? Give reasons for your answer.

XXI. A agreed to build a house for B for a certain sum and according to certain specifications. A did not follow the specifications strictly and before he completed his work he assigned his contract to C. If he had not assigned the contract and had sued B for the amount of the contract what would have been B's defense? Having assigned the contract will B be obliged to pay to C the full amount of the cost price? Can B plead in defense the same against C that he could against A?

XXII. A dispute arose between A and B as to the amount due from B to A. A claimed $90 while B conceded only $60. Under these circumstances what is the best thing for B to do? If A sues B for $100 what can B do, if anything, to relieve himself from costs and what will be his defense? If upon trial it is found that $60 only is due, who must pay the costs and why?

REVIEW QUESTIONS.

1. What is law? 2. Name the general kinds of law. 3. Define moral law. 4. Define natural law. 5. What is municipal law? 6. Into what classes is municipal law divided? 7. What is the extent of municipal law? 8. What is the common law? 9. How many and what kinds of statute law do we have? 10. Give the order of precedence of our different classes of laws. 11. What is property? 12. What is real property? 13. What is personal property? 14. What is a thing in action, and how does it differ from a thing in possession? 15. In what way is property held with respect to the number of holders? 16. What is a joint tenancy? 17. What is a tenancy in common? 18. Define a contract. 19. Give the essentials of every contract. 20. In what four ways may contracts be divided? 21. What is a void contract? 22. What is a voidable contract? 23. What is a specialty? 24. What is a parol contract? 26. How did specialties originate? 26. What is an executory contract? 27. What is an executed contract? 28. State the general rule as to who may contract. 29. For what two reasons are there exceptions to this rule? 30. How does a lunatic differ from an idiot? 31. Are a lunatic's contracts void or voidable? 32. Are an idiot's contracts void or voidable? 33. To what extent is intoxication a disability? 34. What contracts of an infant are valid? 35. What contracts of an infant are voidable? 36. Are any contracts of an infant void? 37. What was the common law in reference to married women as parties to a contract? 38. What changes have the statutes usually made in this regard? 39. Of what does assent consist? 40. How long does one have in which to accept a proposition? 41. When does the acceptance take place when it is made by letter? 42. Can one withdraw his proposition at any time? 43. What is meant by "giving an option"? 44. How may acceptance be implied? 45. What is duress? 46. When will duress be a good defense? 47. When will a mistake relieve a party from his contract? 48. What is consideration? 49. What considerations are legally sufficient? 50. What is a good consideration? 51. When will a good consideration support a contract? 52. Name the valuable considerations. 53. Name six considerations that are insufficient. 54. What is an impossible consideration? 55. Will a moral consideration ever support a contract? 56. State the rule in this regard 57. Define subject matter. 58. State what cannot be legal subject matter. 59. What is the effect of an agreement that is illegal? 60. What is meant by a legal remedy? 61. Name the steps in an ordinary trial at law. 62. What is a judgment? 63. What is an execution? 64. What is meant by "exemption laws"? 65. What is garnishment? 66. What is replevin? 67. What is attachment? 68. Can a debtor be imprisoned for failure to pay his debt? 69. What is a legal defense? 70. What is the statute of frauds? 71. Give the substance of it. 72. What is a statute of limitations? 73. When does the statute begin to run? 74. What will usually excuse failure to bring action within the appointed time? 75. Which of these apply to the debtor? 76. What is tender? 77. How must a tender in money be made? 78. How must a tender of chattels be made? 79. What is the effect of a legal tender of money? 80. What is the effect of a legal tender of chattels? 81. When is payment by mail at debtor's risk, and when at

creditor's? 82. When is a note payment and when is it not? 83. What can you say of a payment by check? 84. Will a part payment cancel the whole debt by agreement? 85. Give the rule for the application of payments. 86. How may performance be used as a defense? 87. How far is time an essential element? 88. When can a party rescind for lack of promptness in performance? 89. When must he accept performance and then claim a rebate for lack of promptness? 90. What is meant by *quantum meruit?* 91. In what connection is the phrase used? 92. What is meant by *quantum valebat?* 93. In what connection is it used? 94. What is meant by forfeiture? 95. What are liquidated damages? 96. When will the law uphold them? 97. What is set-off? 98. How may set-off be used as a defense? 99. What is recoupment? 100. How does set-off differ from recoupment?

LEGAL MAXIMS.

1. Ignorance of the law excuses no one.
2. No one is bound to do what is impossible.
3. No injury is done by things long acquiesced in.
4. An action is not given to one who is not injured.
5. If the plaintiff does not prove his case the defendant is absolved.
6. No one is responsible for inevitable accidents.
7. The proof lies on him who affirms, not on him who denies.
8. It is one thing to possess, it is another to be in possession.
9. A person ought not to be judge in his own cause.
10. One alleging his own infamy is not to be heard.
11. The intention of the parties is the soul of the instrument.
12. Good faith does not allow us to demand twice the payment for the same thing.
13. Let the purchaser beware.
14. That is sufficiently certain which can be made certain.
15. An evidence of debt found in possession of the debtor is presumed to be paid.
16. A condition precedent must be fulfilled before the effect can follow.
17. Where two parties are equally in fault the party in possession has the better cause.
18. Time runs against the slothful and those who neglect their rights.
19. The law does not notice trifling matters
20. A day begun is held as complete.
21. Every man's house is his castle.
22. A gift is not presumed.
23. It is fraud to conceal a fraud.
24. What I cannot do in person I cannot do through the agency of another.

NEGOTIABLE INSTRUMENTS.

CHAPTER XIV.

138. Introduction.—As a general rule a man may sell and transfer anything to which he has a clear title. We have seen that an account may be a valid consideration. This implies that it may be transferred or assigned, yet it is not negotiable. *Negotiability is not then transferability.* The difference may be shown by the following illustrations: You have an account against A, and you also hold B's negotiable note, either may be transferred, but only the note is negotiable. You transfer both the note and the account, under proper conditions, to C; they each fall due and are unpaid. C then brings an action against A on the account, and against B on the note. In the suit against A, if he had any claim against *you* which he could urge, for instance as a set-off, he could also urge it in this suit of C's, and thus might entirely, or partially, defeat C's claim. Not so in the case against B on the negotiable note. When it passed into C's hands it was freed from any and all defenses that might have been urged against it in your hands. This is a privilege accorded to no other evidence of indebtedness than negotiable paper. As a result of this privilege a negotiable paper *may* be transferred and the purchaser take a better title to it than the seller ever had. This is an exception to the general rule that no better title can be given than the seller himself has.

139. A Negotiable Instrument is a written contract possessing certain necessary elements, and which when transferred under certain conditions, passes to the purchaser free and clear of any defenses that might have existed against it in the hands of the original holder.

This definition raises two questions, (1) what are the necessary elements, and (2) what are the certain conditions of transfer. Only the first will we attempt to answer for the present.

140. The Necessary Elements.—While negotiable paper remains in the hands of the original holder, it is merely an ordinary written contract, subject to all the usual rules of interpretation, and must possess all the four essential elements of any contract. It is only when it is about to be, or has been, transferred, that it is necessary to inquire what are the essentials that give to this class of contracts its peculiar privileges.

NECESSARY ELEMENTS
1. Competent Parties.
2. Made in Writing.
3. Payable in Money.
4. Payable Absolutely.
5. Negotiable in Form.
6. Time Specified.

141. Competent Parties.—These may be divided into (1) original, or those who are named in the instrument, and (2) subsequent, or those into whose hands it may fall later.

The competency of these several parties does not, as a rule, differ from the competency of parties to an ordinary contract. The original parties must in fact be the exact parties mentioned in the paper. Hence when a name is forged to a negotiable paper it creates no liability on the part of the person whose name is forged, not even in the hands of an innocent holder.

The original parties must all be designated with certainty. This is necessary that he who is to pay must know to whom payment should be made, and on the other hand that he who is to receive payment must know from whom to demand it.

When a contract is signed by an agent he should sign the name of his principal, then under it by "A. B." For a contract signed "A. B. agent for C. D." is A. B.'s contract.

142. Made in Writing.—By this is meant either writing or printing, or both. In fact a large proportion of the negotiable paper of business is made on printed blanks, only those portions wherein one may differ from another being inserted in writing. The writing should, for obvious reasons, be in ink, but a negotiable instrument written with a pencil is valid.

The instrument should, of course, be signed by the maker or drawer, but as this is a unilateral contract it need not be signed by

the other party. His acceptance of the paper is a sufficient indication of his assent.

By the Negotiable Instrument law a paper does not lose its negotiable character by being under seal.

143. Payable in Money.—A negotiable instrument must be payable in money, and not in goods and chattels. If payable in specific articles it becomes a special contract, and loses its special character as a negotiable instrument. It may in all other respects be in correct form, and while it may be transferred by delivery, yet it is not negotiable. The amount must also be stated with certainty, or the means given by which it can be ascertained easily. It is not negotiable if it be for a certain amount, "and all other sums which may be due." If there be added to the amount "with current exchange," the paper is negotiable, because the amount can be easily ascertained. The amount is usually expressed in both figures and words. In case these differ, the written amount prevails, unless there is evidence that the figures are correct.

By the statutes of some States,[1] a note or other instrument payable in specific chattels is negotiable, and in some States it has been enacted that even negotiable words are not necessary.

144. Payable Absolutely.—There can be no condition or contingency attached to the payment. A negotiable paper, it has been said, "is a courier without luggage." It must contain certain direction or order or a certain promise to pay. A mere acknowledgment of a certain indebtedness, such as I. O. U. $100, will not usually be sufficient. While the promise to pay may be implied, yet it is not expressed. If there be any conditions attached to the payment, such as, provided a certain ship arrives, or when A shall marry, it destroys its negotiability. So also if it be payable out of a certain fund, for the fund may not be sufficient.

If a note is made payable by installments, with a condition that if default be made in the payment of any installment, the whole shall be immediately payable, this form is not so uncertain as to render the note a mere contract.

It will be remembered that the object of negotiable paper is to serve as a substitute for money in facilitating exchanges, hence it must be so written that it can be taken without hesitation, and its value easily determined.

[1] Alabama, Illinois, Indiana, Iowa, Kentucky, Minnesota, Montana, Virginia.

145. Negotiable in Form.—This means that it must contain negotiable words. The instrument must show on its face that it was intended to pass from hand to hand, and not to remain in the hands of the original holder. The words usually employed to show this are "bearer," "or bearer," "or order," "or assigns."

N. I.—A paper is payable to bearer when it is payable to "A or bearer." (See sec. 148.)

146. Time Specified.—Like all written contracts, negotiable paper should be dated, but this is not absolutely necessary. It should, however, state the time when due, or at least give the facts by which this can readily be determined. This is for two reasons, (1) that the holder may know when to demand payment, and (2) that the time may be fixed when the statute of limitations begins to run. "On demand," "at sight," "at — days' sight," "— days from date," are common expressions in this connection, and are sufficiently definite.

An instrument may be antedated or postdated, provided it is not done for an illegal purpose, and when the date is given, though it be not the correct one, it is the one that will be used in fixing the date of maturity. If the date be left blank, any holder has the right to insert the true date; and should he insert an improper date, the parties will still be bound to an innocent *bona fide* holder.

147. Delivery.—In addition to the above essentials which go to the make up of the paper itself, it must be delivered before it has effect. If an otherwise valid instrument gets into circulation without the consent and through no fault of the maker he is not liable for it.

148. The law in reference to negotiable instruments arose through the custom of merchants and in many respects it differs from the rules applicable to other forms of contracts. These customs were gradually recognized by the courts and became a part of the unwritten law as might any custom equally general. The different states modified this law some in one particular and some in another. Though these changes were not usually material nevertheless they caused some confusion and an effort is now being made to put the law into statutory form and have all the states ratify it. This has already been done in sixteen states,[1] and is being considered in a number of others. This statute is called the "Negotiable Instrument Law." References will be made to this law from time to time and they will be designated by "N. I." In this manner changes in the law will be shown.

149. N. I.—Negotiable instruments given for patent rights must contain the words, "given for a patent right" and are subject to the same defenses as in the hands of the original holder.

[1] The following states have adopted the Negotiable Instruments Law: Colorado, Connecticut, District of Columbia, Florida, Maryland, Massachusetts, North Carolina, North Dakota, New York, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington and Wisconsin.

CHAPTER XV.

DRAFTS.

150. Introduction.—Having learned the definition of negotiable paper, and noticed in detail the necessary elements which make this a favored class of contracts, it will be well to study and describe individually the papers composing the class. The most common kinds are draft, or bill of exchange, note and check. The oldest of these is the draft. It was early recognized as negotiable by the Law Merchant of England, and in this way became a part of our common law. It is, in fact, the only instrument that is negotiable by the common law. All other papers, if negotiable at all, are made so by statutes, prescribing the conditions of negotiability.

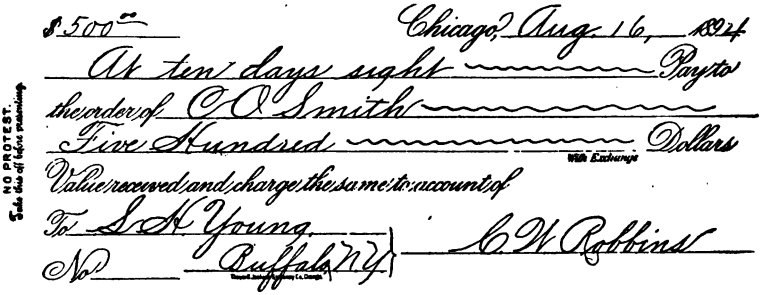
151. Necessity of Drafts.—As we have said, the bill of exchange is the oldest negotiable paper. Its name, from the French *billet de change*, indicates quite clearly the use which it subserves. Thus, if A and B are in Chicago, and C, in Havana, be indebted to A five thousand dollars, and B be going to Havana, B may pay A his five thousand dollars and take a bill of exchange drawn by A in Chicago upon C in Havana, and collect the amount from C when he arrives there. All parties are by this arrangement accommodated, for A receives his debt, due at a distance, by transferring it to B, who receives back his money at the end of his journey. All parties have avoided the dangers of loss by robbery and the perils of the sea, to say nothing of the expense attending the transportation.

From this primitive use, the functions of the bill of exchange have increased until now it is in a great measure the equivalent of money itself. As an evidence of indebtedness it facilitates the exchange of credit and thereby adds to the sum total of the circulating medium. The buying, selling and handling of credits, evidenced by the bill of exchange, forms a great part of the business of banking. A, of New York, owes B, of Chicago. B, needing the money at once, draws a draft on A, and sells it to his bank for cash. The credit has now

passed from B to the bank. The Chicago bank will then forward the draft to some New York bank, who will present the draft to A and get the cash for it. Instead of remitting this cash to the Chicago bank, as its agent, it will be passed to its credit. The result of all this exchanging is that the Chicago bank paid out money in Chicago, and without the transporting of any money, secured a credit on the books of the New York bank. A has paid his debt and B has secured his money.

152. Definition of Draft.—It is said that negotiable instruments are either promises or orders to pay money. A draft is an order. It may be defined as an unconditional order in writing signed by the person giving it, directing a second person to pay a third person, or order or to bearer, a certain sum of money on demand or at a fixed future time. A draft drawn on a person in another country or State is called a *foreign bill of exchange*—if drawn on a person in the same State it is an *inland bill of exchange*. The term *draft* is now almost always used instead of *bill of exchange*.

153. Parties to a Draft.—It will be observed from the above definition that there are three original parties to a draft, and that there may be an indefinite number of subsequent parties. The person who signs the draft is called the *drawer*, the one to whom it is addressed and who is to pay it, is called the *drawee*, and the one to whom it is made payable is called the *payee*.


500^{00} Chicago, Aug. 16, 1894

At ten days sight Pay to

the order of C. O. Smith

Five Hundred Dollars

Value received and charge the same to account of

To S. A. Young, No. Buffalo, N.Y. C. W. Robbins

NO PROTEST. Take this off before presenting

In the above form Robbins is the drawer, Young the drawee and Smith the payee. Sometimes the drawer and the payee are the same person.

The subsequent parties are the ones designated by the payee to whom payment should be made. They are endorsees, but may in turn become endorsers.

154. Time Draft.—The above draft is drawn at ten days' sight, and is called a time draft. If payable "at sight" it would be a sight draft, because payable as soon as the drawee sees it, which would be when it is presented to him. Some States allow days of grace on sight drafts, in which case this draft would be due three days after presentation to Young and his acceptance thereof. If the draft be drawn "fifteen days from date," it is a time draft. If payable "on demand" it is due immediately upon presentation without grace. The various States have statutes fixing the date when the statute of limitations begins to run on demand paper. The time differs from one day to four months from date. (See sec. 107.)

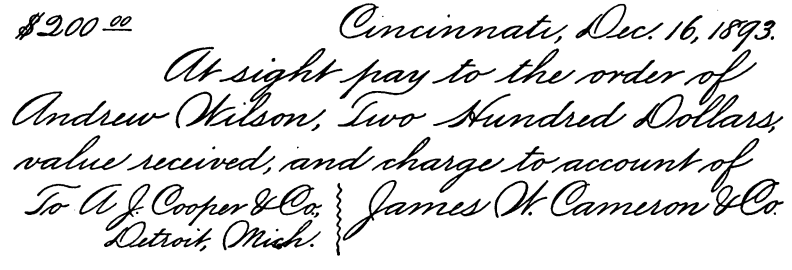
155. Acceptance of a Draft.—All drafts payable a certain number of days after sight, and also sight drafts, when allowed days of grace, should be presented for acceptance. The conditions of a proper presentation will be explained in a later chapter.

If in the above draft we suppose that Smith, instead of transferring the draft, retains it, he should at an early date present it to Young for his acceptance. It will be noticed that the draft itself contains no promise on the part of Young to pay; in fact, until presented to him, he may not even know of its existence, although it is customary for the drawer to notify the drawee that he will draw upon him. If Young consents to pay the draft according to its terms, he is said to accept it. This he does by writing across the face of the draft, "Accepted August 17, 1894, L. H. Young." The word "accepted" evidences his agreement to pay it, and the date is the date from which we begin to count the ten days and the three days of grace, if such be allowed. By this means we are able to fix the day of maturity.

If on presentation Young does not wish to accept the draft, he should return it to Smith. The draft is then said to be dishonored.

156. How to Transfer a Draft.—The payee of a paper is always its first holder. The meaning of the language used in negotiable paper, whether it be a promise or a direction, is to pay to the person named in the paper, or to any one whom he may designate. When, therefore, he disposes of the paper he names the buyer as the one to whom payment should be made. This he does by endorsement. Thus, suppose in the form we have given, Smith, after having the draft accepted, disposes of it to C. W. Benton. This he does by writing across the back of the paper, "Pay to C. W. Benton or order,"

signing his own name beneath and handing it over to Benton. In like manner Benton may dispose of it to another by the same kind of an endorsement, or he may simply write his own name on the back of the paper. This is called an endorsement in blank, and has the effect of making the paper payable to bearer.



SIGHT DRAFT.

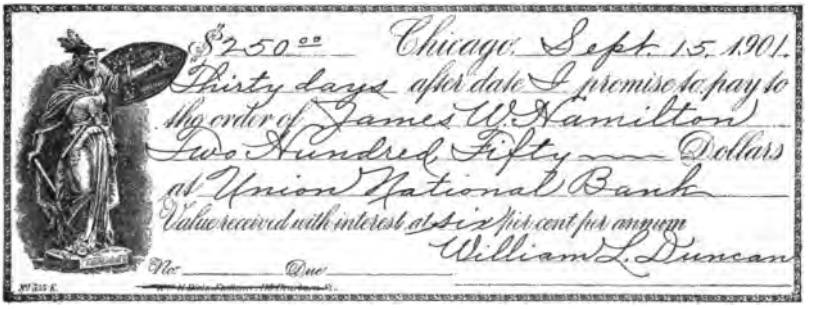
157. A Foreign Bill of Exchange is one that is drawn by a resident of one State or country upon a resident of another. On account of the great danger of loss in sending these by sea, it early became customary to draw them in sets of three, each essentially a duplicate of the other two. These were sent by separate routes, and the first to arrive and be paid made the others void. They are in substantially the same form as inland bills, but are always drawn in the currency of the drawee's country.

CHAPTER XVI.

NOTES.

158. Definition.—As we have previously remarked, notes are not negotiable by the common law, but have been made so by statute. A negotiable promissory note may be defined as an unconditional written promise made by one person to another engaging to pay on demand or at a fixed future time a certain sum of money to order or to bearer. To be negotiable a note must of course possess all the essential elements of negotiable paper.

159. Form of Note.—



160. Parties to a Note.—There are two original parties to a note. The maker is the one who signs it and agrees to pay it. The payee is the one to whom, or to whose order, it is made payable.

161. Joint and Several Notes.—If the note be drawn "We promise to pay, etc.," and is signed by two or more parties it is a joint note. A note signed by more than one person and beginning "I promise" is several as well as joint, and so is one by two makers running "we or either of us." In case of a joint and several note, the holder can sue the makers all together or he may sue them separately, for each assumes the entire responsibility of paying the whole sum. If the note be joint only, all the makers must be joined in the suit. At common law it is settled that in case of a joint obli-

gation if one of the obligors die his estate is discharged and the survivor or survivors alone can be sued. The statutes in many States, however, have changed this rule.

162. Negotiable Words.—These are as necessary in negotiable notes as in bills. In some States peculiar phrases are also essential to the negotiability of notes. In Alabama, Kentucky, Indiana and Virginia they must be payable at a bank. In Missouri, "for value received" must be used in a note but not in a bill. In Illinois a note payable to "A or bearer" is not under the statute negotiable without endorsement by A. Any peculiarity in the statute of the State where a negotiable instrument is made payable should be carefully complied with.

N. I.—Paper payable to "A or bearer" is negotiable without endorsement.

163. Notes, How Transferred.—When notes are negotiable they may be transferred by endorsement the same as drafts. The payee becomes the first endorser. He may do this by any of the forms of endorsement. When a negotiable note is properly transferred the endorsee may sue and collect from the maker in his own name.

It will be remembered that an ordinary contract assigned must be sued on in the name of the original payee. (See sec. 133.)

$500 Chicago, Nov. 10, 1893

On demand I promise to pay William D. Hammond, or order, Five Hundred Dollars, value received.

Samuel M. Duncan.

DEMAND NOTE.

164. Accommodation Note.—It sometimes happens that a person may wish to assist a friend financially by loaning him his credit. As a rule banks will not loan money on the credit of one man alone. They require two signatures. A wishes to borrow money. B is a friend of his and has no money but has a good credit and is willing to assist A. B draws his note payable to A for the amount, and this he delivers to A. As no consideration has passed between them A can not collect the amount from B. A takes the note to a bank and sells it for cash, endorsing it over to the bank. At maturity A is supposed to pay it and thus save B harmless, but if he fails to do so B must pay it and then collect in turn from A. This is called an

accommodation note, because it is given solely for accommodation and without consideration. Drafts are also frequently accepted for the same purpose.

165. Notes Issued in Blank.—Another way of loaning credit is to sign a blank note or accept a blank draft which is afterwards to be filled out by the holder. It is a settled principle that when such papers are filled out the parties become as absolutely bound as if they had signed them after their terms were written out. If they should be filled out for more than the limit agreed upon they would still be binding if transferred to the hands of an innocent holder for value.

N. I.—A note or acceptance made payable at a bank is equivalent to an order on that bank to pay the same for the account of the maker or acceptor.

166. Payee in Blank.—Notes and bills are also often executed in full with the exception of the name of the payee which is left blank that it may be afterwards filled up with the name of the last holder, the object being to enable the buyer to transfer the paper without incurring the responsibility of an indorser. Until filled the paper is practically payable to bearer.

167. Judgment Note.—This is in form an ordinary note to which is added (1) a power of attorney for the holder or any attorney he may appoint to confess judgment against the maker when payable; (2) a waiver of the benefit of appraisement laws or homestead exemptions; and (3) an agreement to pay attorney's fees for such confession.

It was first supposed that the addition of these conditions made a contract of the instrument and that it thereby lost its negotiability but it is now well settled that it is negotiable where allowed, which is only in a few States.

N. I.—This act legalizes these notes and it may be expected that they will now have a wider use.

—JUDGMENT NOTE.

$[redacted]

Chicago, Apr. 15, 1901

Three months after date we promise to pay to the order of Henry W. Munson

One Thousand Dollars, IN COLLATOR CURRENCY.

Payable at Continental National Bank

Value received with interest at six per cent. per annum after date until paid (and Twenty-five Dollars additional as Attorney's fees.) Provided, however, that if this note is paid without Suit or Judgment, this or Attorney's fees are to be paid.

NOW, THEREFORE, in consideration of the premises and of said loan made, constitute and appoint JOHN D. ODELL, or any Attorney of any Court of Record, to be our true and lawful Attorney, irrevocably, for us and in our name, place and stead to appear in any Court of Record, in term time or vacation, in any of the States or Territories of the United States at any time before or after the said note becomes due, to waive the service of process and confess a judgment in favor of the said Henry W. Munson, or his assigns, upon said Note for the sum above, and interest thereon to the day of the entry of the said judgment, together with costs and damages, and also said Attorney's fees; and also, to file a cognovit for the amount thereof, with an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of said judgment and to release all errors that may intervene in entering up said judgment or issuing any execution thereon; and also to consent to immediate execution on said judgment; also to waive all benefit or advantage to which I may be entitled by virtue of any Homestead or other exemption law, and all laws authorizing the redemption of lands after sale under execution, now or hereafter in force, in this or any State or Territory of the United States, where judgment may be entered by virtue hereof; hereby ratifying and confirming all that said attorney may do by virtue hereof.

C. W. Levinson [SEAL.]

John Andrews [SEAL.]

168. Benefit of Judgment Note.—A judgment note is often of great advantage to the holder over an ordinary promissory note. This is especially true when time is an important element in the collection. To begin suit and secure judgment on a judgment note is ordinarily but the work of a few minutes, or hours at least, while to get service, bring the case to trial and secure judgment on an ordinary note may take months. In the meantime more fortunate creditors, or those who are preferred by the debtor may have secured all the debtor's available assets.

$ 1500 00 Chicago, Ill., May 16, 1901.

Sixty days after date, I

promise to pay to the order of THE BANKERS NATIONAL BANK, of Chicago, at its office in Chicago,

One Thousand Five Hundred DOLLARS,

for value received, with interest at the rate of 7 per cent. per annum after maturity.

C E Stevens.

I have deposited with and pledged to said BANKERS NATIONAL BANK, of Chicago, as collateral security for the payment of the above note and all other liabilities of the undersigned, to said BANKERS NATIONAL BANK of Chicago, or its assigns, heretofore or hereafter contracted, the following property:

Twenty shares of Common Stock of the Union Traction Company of Chicago of the par value of Two Thousand Dollars represented by certificate # 625

The market value of which is $ 2000 00 In case said BANKERS NATIONAL BANK, of Chicago, or its assigns, shall at any time, be of the opinion that said property is of less value than above stated, or shall have depreciated in value, or is likely to depreciate in value, or in case any liability of the undersigned to said BANKERS NATIONAL BANK, of Chicago, or its assigns, shall be at any time increased, then in all, any or either of such cases, said BANKERS NATIONAL BANK, of Chicago, or its assigns, may in its, or their discretion, call for additional security, satisfactory to the holder of said note, and failure to furnish the same before twelve o'clock, noon, of the day next after the day of such calling, shall make said note, and any and all other liabilities of the undersigned to said BANKERS NATIONAL BANK, of Chicago, or its assigns, without notice or demand, at once due and payable. Said call for additional security may be made by giving any of the undersigned, oral or written notice thereof, or by leaving written notice thereof at any office, place of business or usual abode of any of the undersigned.

The undersigned hereby gives said BANKERS NATIONAL BANK, of Chicago, or its assigns, full and irrevocable power to sell the said property, or any part thereof, without advertising or demanding payment, or giving notice, at public or private sale, or at brokers' board, in case said BANKERS NATIONAL BANK, of Chicago, or its assigns, shall at any time, be of the opinion that said property, or any part thereof, has declined or may decline in value, or is or may become of less value than above stated, or in case such additional security, if called for, shall not be furnished as above provided, or in case said note or any other liability or liabilities of the undersigned to said BANKERS NATIONAL BANK, of Chicago, or its assigns shall not be paid at maturity.

If said sale shall be public, or at any brokers' board, the said BANKERS NATIONAL BANK, of Chicago, or its assigns, may purchase the said property, or any part thereof at such sale. The net proceeds of such sale, after the payment of all costs, expenses and attorney's fees growing out of or connected with said property, and the sale and delivery thereof, may be applied upon all or any of the liabilities (whether due or not) of the undersigned, to the holder of said note, and the surplus, if any, shall be paid to the undersigned.

If the net proceeds of such sale or sales shall not pay in full, all of the liabilities of the undersigned to said BANKERS NATIONAL BANK, of Chicago, or its assigns, then all such liabilities remaining unpaid, shall become at once due and payable, and bear interest at the rate of seven (7) per centum per annum from the time of such sale. In case of any exchange of or substitution for, or addition to said property, or any part thereof, the provisions of this agreement shall extend to such new substituted or additional property. And the undersigned hereby authorizes the said BANKERS NATIONAL BANK, of Chicago, at any time, in its discretion, to apply any money or moneys which said bank may have or hold on deposit, or otherwise for the undersigned, toward the payment of said note and other liabilities whether due or not.

C E Stevens.

FORM OF COLLATERAL NOTE.

169. Collateral Note.—It is frequently the case when a note is issued some form of security passes with it as a pledge for its payment. Thus a broker wishing to borrow money from his banker may give his note and pledge stocks or bonds which he may own to secure the banker. For this purpose a special form of note called a "collateral note" is provided. In addition to the usual form of note it contains an agreement as to the rights of the holder in realizing on the securities called "collaterals." The collaterals for the protection of both parties should be carefully described. The N. I. law makes such notes negotiable notwithstanding they contain contractural features.

For a description of the proper proceedings to realize on collaterals pledged when there has been a default see *56 S. W. Rep., 1117.*

CHAPTER XVII.

CHECKS.

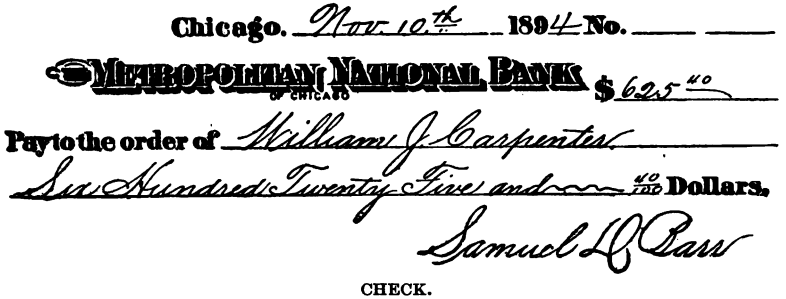
170. Definition.—A check is an order drawn upon a deposit of funds in a bank for the absolute payment of a certain sum of money to a certain person, or his order, or to the bearer, and payable instantly on demand. It will thus be seen to contain all the essential elements of negotiable paper and without doubt it forms the largest part of that important class of contracts.

171. Explanation.—As the definition states, a check is a kind of draft, and all we have said in reference to the use and transfer of a draft applies with equal force to a check. It will be noticed, however, that a check is not entitled to days of grace as is a draft, but is payable on demand. The whole theory and use of a check points to its immediate payability; in fact this is its most distinguishing feature.

N. I.—Sec. 322 provides that a check must be presented within a reasonable time after its issue or the drawer will be discharged to the extent of the loss caused by the delay.

172. Parties to a Check.—As in a draft, of which this is a species, there are three parties to a check, the drawer, or one who signs it, the drawee, which is always a bank, and the payee. The contract represented by the check is between the bank and the drawer,

consequently if for some reason the bank refuses to pay the check, the holder cannot maintain an action against the bank. It is his duty to take all steps necessary to preserve his rights against the drawer. For the same reason the payee cannot stop payment on a check by notifying the bank, though the drawer can do so. After certification the case is different. The N. I. law makes no changes in this law


Chicago. Nov 10th 1894 No. ____

METROPOLITAN NATIONAL BANK OF CHICAGO $625.40

Pay to the order of William J. Carpenter

Six Hundred Twenty Five and 40/100 Dollars.

Samuel L. Barr

CHECK.

173. Banking.—Business men do not as a rule have proper facilities for protecting their ready money from either fire or robbers. It is the business of a bank to offer this protection without charge, its compensation being the use it can make of a certain proportion of the money so deposited with it, which it can expect not to be called on for. It is understood that any money so left on deposit is subject to check, that is it may be had on demand.

174. Method of Depositing.—When money is deposited in a bank some kind of a voucher or receipt should be taken from the officer who receives it. This voucher is usually in one of three forms. It may be a *bank book*, a *certificate of deposit*, or a *cashier's check.*

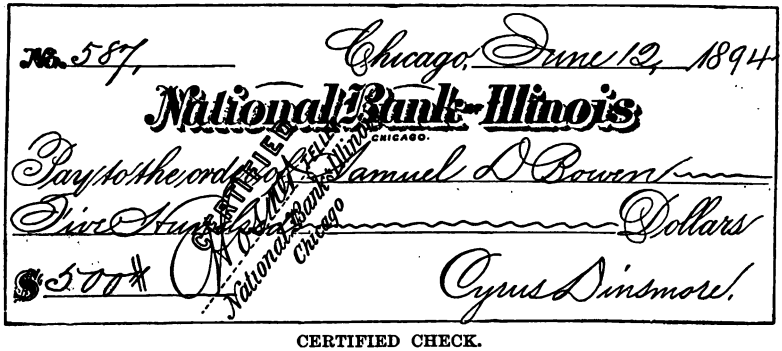
175. Bank Book.—When the intention is to withdraw portions of the deposit as needed and to add to it from time to time, in other words to keep a running account, the bank book offers many advantages over the other vouchers. It is a small blank book usually with a printed cover and headings, purporting to be a copy of the depositor's account with the bank. When a deposit is made the bank official who receives it enters the amount on the left hand page, and the book is handed back to the depositor and operates as his receipt. Against this deposit checks are drawn as needed. In this manner millions of dollars are deposited with banks yearly and often no other record is made by the depositor than that contained in this

book. Periodically the book is handed in to the bank to be balanced, that is for the bank to insert on the right hand page the several amounts of the checks paid and the balance now due the depositor. When the depositor wishes to pay a debt, if he has money in the bank, he can draw his check for the amount, making it payable to his creditor or his order or simply to the bearer and hand it over to him.

176. Object of Post Dating.—It frequently happens that while a depositor may not have money in bank to-day, yet he expects to have in a few days. He can draw a check dating it forward to the time when he feels sure he will have that amount to his credit. Such a check has no life until the day of its date arrives and a bank paying it before, would do so at its peril.

177. Negotiable Words.—It requires the same necessary elements to make a check negotiable that it does in case of any instrument. A check may be drawn for instance without such negotiable words as "or order," or "or bearer," and in that case would be non-negotiable. When a check is negotiable it may be transferred by endorsement in the same manner as other instruments. A check made payable simply to bearer, or to A or bearer, may be transferred without endorsement. For this reason it is not safe to have checks so written unless they are to be used at once, for a check so written and lost or stolen might be cashed by the finder or by a thief.

178. Certified Check.—If the one who is about to receive a check is doubtful whether the drawer has that amount in the bank to his



CERTIFIED CHECK.

credit or is fearful that having it in the bank he may withdraw it, he may insist on its being certified by the bank as good. The bank

does this by writing or stamping across the face of the check usually the words "Certified" and signing it by the proper official. By this act the bank agrees to pay the check and to reserve that amount out of the drawer's deposit. There is now for the first time a contract between the holder and the bank. The bank would now be obliged to pay the check even if it proved to be a forgery, for it is a rule that a bank is bound to know the signatures of its depositors.

If the holder of a check should take it to the bank and procure its certification and before the check was presented for payment the bank would fail it would not be the drawer's loss.

N. I.—If the holder of a check procures it to be certified the drawer and all endorsers are released.

179. Checks Operate as Receipts.—When a debtor is paying an obligation by check, he can and frequently does, make the check payable to his creditor or order. In order to transfer this to a new holder, or to get it cashed at the bank it must be endorsed, and when the checks are entered in the depositor's bank book by the bank they are returned to him. The endorsements of his creditors operate as vouchers that those amounts have been paid.

180. Certificate of Deposit.—This is another form of voucher for money deposited in a bank. It will be noticed that the language used is not an express promise to repay the amount acknowledged as received and for this reason it was early held as not negotiable although correct in all other respects. They are now, however, generally recognized as negotiable when drawn in negotiable form.

Money so deposited is not subject to check and if a portion of it is desired either an endorsement of partial payment is made on the back, or the old certificate is taken up and a new one issued for the

lesser amount. This is a favorite method of depositing when it is expected that the amount shall remain for a long time.

It may be transferred by endorsement in the same way as other paper.

The above instrument is not negotiable on account of being payable "in current funds." An endorser of it would incur no liability. *36 Pa. State Reports, 498. 28 Pa. State Reports, 452.*

181. Cashier's Check.—It is now the custom in many banks to issue a cashier's check instead of a certificate of deposit. This is simply an ordinary check in form drawn by the cashier or teller in his official capacity. It is of course payable on demand and may be used exactly as an ordinary check.

CHAPTER XVIII.

CONDITIONS OF TRANSFER.

182. Explanation.—Having set forth the elements necessary to constitute a negotiable paper, and having examined them in detail, we now come to consider the conditions under which it must be transferred from the hands of the payee, in order to insure a good title to the holder. The six necessary elements for negotiability referred to the form and substance of the paper itself. We are now about to consider the circumstances under which the transfer is made. These are four in number, and are as follows: (1) *Transfer for value;* (2) *Transfer to an innocent holder;* (3) *Transfer in the usual course of business;* and (4) *Transfer before maturity.*

183. Transfer for Value.—We have learned that negotiable paper forms an exception to the general rule that the buyer will take no better title than the seller had himself. In order to fall within the exception the transfer must be made for value. If no value be given for the paper the purchaser will not be injured by its being declared void in his hands. This consideration need not be money, but may be anything the law considers as valuable. A new liability incurred will be sufficient. A lost paper cannot be enforced by the finder because he did not give value for it, but he may transfer it so that it can be enforced in the new holder's hands. On the other hand a

negotiable note given for an illegal consideration, while absolutely void in the hands of the payee if transferred for value, may be valid in the hand of the new holder.

By the N. I. law a negotiable paper transferred in consideration of an existing debt will be deemed as transferred for value.

184. Transfer to an Innocent Holder.—An innocent holder is one who takes the paper innocent of any defects in the seller's title or right to recover on it. If he takes the paper and even pays value for it, knowing that the seller's title is poor or that there is a good defense against the instrument, he is not an innocent holder. He will in this case take the seller's title and no better.

This does not mean that he can close his ear to any suggestion of fraud or defects in the seller's title. If he receive such suggestions or if the circumstances are such as to excite the suspicions of a prudent man that the paper may not be valid, he should investigate before buying.

185. Transfer in the Usual Course of Business.—In the third place the holder must acquire the paper in the usual course of business. By this is meant that it must come as a regular transfer according to the customs of commercial transactions. A transfer in payment of a pre-existing debt is now generally conceded to be of this character. A receiver or assignee appointed by court and who comes into possession of a bill or note by virtue of his appointment does not get it in the usual course of business.

As to whether one who takes a note or bill as collateral security takes it in the "usual course of business" the decisions are by no means uniform. The better rule seems to be that if the holder takes the legal title by endorsement and has given a consideration for the transfer, he is entitled to recover upon it even against those who might have made a defense against his pledgor—at least to the extent of the debt of which the instrument is collateral security.

186. Transfer Before Maturity.—Negotiable paper may be transferred by endorsement or delivery either before or after maturity. The paper until paid will retain all its commercial attributes, but there is this vital distinction between the rights of one who receives a paper before maturity and of one who receives it after maturity. He who takes it after maturity simply takes the rights of his transferrer. If the transferrer's right and title be good so will his, but if

there be defenses against the transferrer's right and title they can also be raised against the transferee.

B secures A's note through fraud. B holds the note until after maturity, when he endorses to it C, an innocent holder, in the usual course of business for value. C presents the note to A for payment. A need not pay the note. Had C received the note before maturity it would have been good in his hands and A would be obliged to pay it. If C knew that A had no defense against the note he would have been safe in buying it, even though it were past due.

187. A Natural Inference.—From what has been said it is but a natural inference that though the paper while in the hands of the original holder may have many defects and may be subject to many defenses; yet if it passes before maturity, to an innocent holder, for value, and in the usual course of business, it is forever purged of its imperfections. Future purchasers of it take not the right of the original holder but of the first innocent purchaser. Subsequent holders need not be innocent of the original defenses against it.

188. When Paper Matures.—The exact date of maturity is always an important fact and one about which there should be no dispute, for upon it right and title frequently depend.

When the time of a paper is stated in days, actual number of days are counted; when it is stated in months, calendar months are understood. The date of the paper is not usually a part of the time, but the date of maturity is.

Most states have statutes fixing the length of time after which a demand paper if unpaid is presumed to be "past due."

189. Days of Grace.—These were three days allowed by the law merchant to the drawee of a draft, more than the time stated in the draft. They were originally allowed as a matter of grace or favor and no charge for interest was made for them. Finally they were recognized by the courts as a right belonging to the debtor though he might be required to pay interest for them. They are still allowed by some states on negotiable notes and time drafts. Many states have abolished them by statute;[1] and some states allow them even on sight drafts[2] and a few states have restricted them to paper payable at a bank. Days of grace may be waived by express stipulations in the instrument.

[1] New York, Illinois, Connecticut, California, Idaho, Vermont, District of Columbia, Nevada, New Hampshire, Tennessee, West Virginia, Washington, Colorado, Delaware, Florida, Maine, Maryland, Massachusetts, Wisconsin, Rhode Island, Virginia, North Dakota, Ohio, Montana, New Jersey, Oregon, Pennsylvania, Utah.

[2] Alabama, Arizona, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Wyoming.

The N. I. law abolishes grace and provides that when the day of maturity falls on Sunday or a holiday the paper is due on the next succeeding business day. If due on Saturday it should be presented on the next succeeding business day but if payable on demand may be presented before twelve o'clock noon on Saturday when that entire day is not a holiday.

When the last day of grace falls on Sunday the paper is usually due on Saturday, and when that day is a holiday then on Friday.

190. Consideration.—The consideration need not be expressed in the paper. There should always, as a matter of fact, be a consideration and if the paper is still in the hands of the original parties proof may be given to show a lack of it.

Not so, however, when the paper has been transferred before maturity to an innocent holder for value. It will then be conclusively presumed that there was originally a consideration given for it. When the consideration is acknowledged in the paper it is usually done by the words *value received*, but as we have said these are not necessary, except in some few states.

191. Defenses.—While it is not possible to state in advance what the defences are that may be avoided by observing the proper conditions of transfer, yet the most common ones are set-off, recoupment, fraud and lack of consideration. Whatever the defense, it must arise out of the transaction in which the instrument was executed and not out of other matters.

192. Recapitulation.—Negotiable paper has been created to circulate with perfect freedom among business men, and for this reason he who takes it is protected in every way possible consistent with the rights of others. A bill or note is offered instead of money. The purchaser observes that the maker is one who is responsible. He of course takes his chances that the signature is genuine. He observes that the paper is made out in proper form and that it is not yet due. Except the genuineness of the signature these are all matters that appear on the face of the instrument, and it is as far as the law requires the purchaser to investigate. If he were obliged to guard against latent defects in the instrument it would greatly hinder its circulation. Having satisfied himself on these points he may safely purchase the paper and will be protected in his recovery upon it.

CHAPTER XIX.

ENDORSEMENTS.

193. Objects.—The object of an endorsement is two fold, (1) to effect a transfer of the title of the instrument, and (2) to evidence a contract. It will be remembered that a negotiable instrument is to circulate as freely as possible, and therefore endorsements are made as simple as possible. To require the entire contract of endorsement to be written out in full each time, would greatly impede the free circulation of the instrument. The law, therefore, supplies it by implication. The contract exists, therefore, and is just as clearly defined as if written out in each case. The one who endorses a paper is called an endorser, and the one to whom it is transferred is called the endorsee.

If the instrument itself contains negotiable words the endorsement need not contain them. Hence, "Pay John Smith" has the same effect as "Pay John Smith or order."

194. Endorsements, Where Made.—All endorsements, as the name implies, should be written on the back of the instrument and not on a separate sheet of paper. The first, if it be a blank endorsement, should be written about one inch from the left hand end of the paper, and subsequent endorsements immediately under, in their order. They should all be written transversely and not longitudinally.

The law of the state where an endorsement is made governs the liability of the endorser. The law of the state where a paper is payable governs the liability of the maker. By the N. I. law an endorsement is presumed to be made where the instrument is dated.

195. What Determines form of Endorsement.—If an instrument is made payable to bearer, or to A or bearer, it can be transferred without endorsement, but if payable to A or order, it must be endorsed in order to transfer its title. This endorsement may be

any one of several kinds, each differing somewhat in form, and in some cases in effect. The most common forms are:

1. In Blank.
2. In Full.
3. Without Recourse.
4. Restrictive.
5. Conditional.

In Illinois paper payable to A or bearer must be endorsed to pass the legal title. Even though it be not necessary to endorse paper payable to bearer, yet if it be so endorsed the endorser is liable.

N. I.—A negotiable paper payable to A or bearer may be transferred without endorsement and the legal title will pass.

196. Endorsement in Blank.—An endorsement in blank is simply the signature of the endorser. It is so called because the endorsement proper is left blank and may be filled in by any subsequent holder. The effect of endorsing a paper in blank is to make it payable to bearer and it may then pass from hand to hand without further endorsement.

197. Endorsement in Full.—An endorsement in full mentions the name of the person to whom or to whose order it should be paid. By this endorsement the paper cannot be transferred without the endorsement of the endorsee and is therefore a good form to use when sending a negotiable paper through the mail.

198. Endorsement without Recourse.—If the endorser wishes simply to assign the paper and to relieve himself *of a portion* of his responsibility for its payment he should add to his endorsement "without recourse." Such an endorsement does not affect the negotiability of the paper, but simply assigns the title to the paper and it may be endorsed again. There are however, some things which *every* endorser warrants. Therefore the holder may recover even from an endorser without recourse, (1) if any of the prior signatures were not genuine; (2) if the note was invalid for the want or illegality of the consideration; or (3) if any prior party was incompetent or (4) if the endorser was without title.

199. Restrictive Endorsement.—When there is a desire to restrict the further negotiability of the paper, a restrictive endorsement should be used. There are several forms of these in common use.

"Pay to A B only," or "to A B for my use" is restrictive. When paper is left with an agent for collection the usual endorsement is "Pay to A B for collection." This does not amount to an actual transfer, but is evidence of the creation of an agency and it may be recalled at any time and the endorsement stricken off. It is for this reason the safest endorsement to use in such a case, for it does not vest the title in the endorsee so that he can bring a suit in his own name, neither can he transfer it. Of the same nature are endorsements on checks deposited in a bank. "For deposit to account of A B" is a common form for this purpose.

This endorsement does not so limit the circulation of the instrument as to compel the endorsee to present it personally. He may again endorse it, but subsequent endorsers take only his right. Thus, a check drawn on a Boston bank may be deposited in a Chicago bank, with the usual endorsement of "For Deposit, etc." The Chicago bank may again endorse it "For Collection, etc." and forward it to its Boston correspondent, who will present it, not as its owner or holder, but as an agent of the holder. The ownership of the paper has been restricted by the first restrictive endorsement. By a rule of the clearing houses paper bearing restrictive endorsements will not be received by members for deposit.

200. A Conditional endorsement is one by which the endorser annexes a condition to the order for payment. "Pay to A B or order if he is living when due" is a conditional endorsement. It has been held that an acceptor who paid a bill endorsed conditionally and before the condition was satisfied, was liable to pay it again.

It is provided in Sec. 69 N. I. law that the party required to pay an instrument so endorsed may disregard the condition but the person receiving it must hold the money subject to the rights of the person so endorsing.

201. Who May Endorse.—If the paper is payable to the order of the payee, he or his legal representative must be the endorser. In the case of a bankrupt the assignee and not the bankrupt is the one to endorse. An infant may make endorsement, but like all his contracts he may avoid it. A paper payable to a copartnership may be endorsed by any member of the firm using the firm name. A paper payable to several payees jointly should be endorsed by all. An executor or administrator will be personally bound on an endorsement although he add "executor" to his name. He should endorse without recourse to avoid personal liability.

Except by statute a person who endorses a non-negotiable instrument or one who places an assignment on a negotiable instrument incurs no liability.

202. Forms of Endorsements.

1. ENDORSEMENT IN BLANK:
"E. C. BECKER."

2. ENDORSEMENT IN FULL:
"*Pay F. F. Judd or order.*
M. JORDAN."

3. ENDORSEMENT WITHOUT RECOURSE:
"*Pay to the order of G. W. Hootman, without recourse to me.*
ALLEN MOORE."
Or, "*J. H. King, without recourse.*"

4. ENDORSEMENT, RESTRICTIVE:
"*Pay to J. C. Smith, for my use.*
H. T. CLARKE."

5. ENDORSEMENT, CONDITIONAL:
"*Pay to A. E. Brown or order, provided he arrives at twenty-one years of age.*
C. W. BENTON."

203. Successive Endorsements.—When several persons endorse an instrument in succession each is liable to all who succeed him and the obligation is several and not joint. Each endorser places his name on the paper knowing that he is making himself conditionally liable to all subsequent holders, and that he can in turn look to all antecedent to him. Where there are several payees, it matters not which endorses first for they will be liable jointly and not severally.

When there is an endorsement before that of the payee's there is much conflict of authority as to its legal status. In some states such a person is presumed to be a joint maker[1] and in others, an endorser,[2] and in still others, a guarantor.[3] But in many states evidence is allowed to rebut this presumption.

Some states have statutes permitting joint action against the endorser and the maker, but such is not the Law Merchant.

204. The Endorser's Contract.—We have previously stated that an endorsement was usually for two purposes, (1) to effect a transfer

[1] Massachusetts, Colorado, Tennessee, Nebraska, North Carolina, Minnesota, Delaware, Michigan, Maine, New Hampshire, South Carolina, Maryland, Wisconsin, Missouri, Texas, Louisiana, Arkansas.

[2] Pennsylvania, New York, Iowa.

[3] California, Illinois, Connecticut, Kansas, Nevada, Ohio.

and (2) to evidence a contract. We come now to consider this contract. A negotiable paper is personal property and the seller of it is responsible to the immediate buyer on the usual principle of sales whether he endorses it or not. When he does endorse it his contract is not only with his endorsee but with all subsequent endorsees. Part of his contract is *absolute* and part *conditional.* He *absolutely* contracts (1) that the instrument is in every respect genuine; (2) that it is the valid instrument it purports to be; (3) that the ostensible parties are competent; and (4) that he has lawful title to it and the right to endorse it. If any of these engagements are not fulfilled, the drawer, the endorser or one who transfers without endorsing, or an endorser "without recourse" may be sued for the recovery of the original consideration which has failed, and this without proof of demand and notice. None of the above provisions may be violated, yet the instrument may not be paid. His contract includes further, that the bill or note will be accepted or paid as the case may be, according to its purport; but *this engagement is conditioned upon due presentment, demand and notice.* What constitutes due demand and notice will be discussed in future chapters, but the student will not fail to observe that a *strict* compliance on the part of the holder with the above conditions is a condition precedent to the endorser's liability; that a failure on the part of the holder to observe the slightest formality will jeopardize his right of action against the endorser.

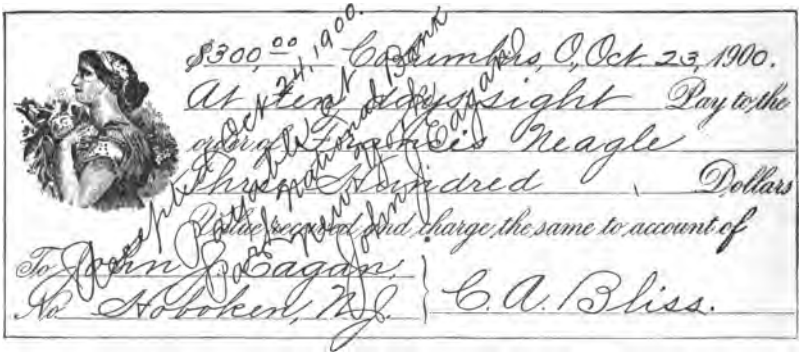
When a negotiable paper is transferred by delivery only, the seller's liability extends only to the immediate transferee.

CHAPTER XX.

PRESENTMENT FOR ACCEPTANCE.

205. Why and When Necessary.—The drawer's contract is a conditional one. It is similar to the endorser's, and unless the holder complies with all the conditions which are implied in the drawer's contract, he will lose his right of action against him. For the purpose then of charging the drawer, also of fixing the day of maturity, drafts due a certain number of days after sight, also sight drafts when days of grace are allowed, should be presented to the drawee for acceptance. It is the right of the holder to present for acceptance a draft due a certain number of days from date, and if it be refused it need not be presented for payment when due, but notice should be sent the drawer at once. If such a draft is not presented for acceptance, the holder loses none of his rights by not doing so.

When a bill payable at a certain time is placed in an agent's hands for negotiation or collection, it is his duty to present it for acceptance. With this exception, the general rule is that such a bill need not be presented for acceptance, but only for payment.



FORM OF ACCEPTANCE.

206. Effect of Acceptance.—The drawee is usually under no obligation to accept unless has he agreed to do so, and the holder cannot sue him even though he have funds belonging to the drawer for there is no contract between the holder and the drawee. If the drawee

refuse to accept, and the holder has neglected to take the steps necessary to charge the drawer, he may lose the entire amount. He cannot give up the draft and seek recovery on the original debt. But an acceptance operates as a full legal assignment of the amount to the holder, and if payment be not made according to the terms of the instrument, the holder may sue the acceptor for there is now a contract between them.

207. Points to Be Observed.—That every step to be taken to charge the drawer may be properly taken, the following must be duly considered: (1) By and to whom should presentment be made; (2) Where; (3) When; (4) How.

208. By and to Whom a Bill Should Be Presented.—The bill should be presented by the holder or his authorized agent, to the drawee or his authorized agent. The party in possession is presumed to have the right to present, and the drawee takes no risk when he accepts the draft for presentment, and protest for non-acceptance will inure to the benefit of the rightful holder. If drawn on a firm, presentment to any partner is sufficient, but if drawn on two persons not partners, it should be presented to both, and if the acceptance of one only is taken, it is at the risk of the holder. Greater care must be used to find the drawee or his agent in presentment for acceptance than in presentment for payment. A clerk in the drawee's office, and in apparent charge, is a competent party to whom to present a bill for either payment or acceptance.

N. I.—When the drawee is an adjudged bankrupt or has assigned for the benefit of his creditors, presentment should be made to his trustee or assignee.

209. Where Should Presentment Be Made.—Presentment for acceptance should be made either at the drawee's office or at his domicile. Sometimes the draft is drawn payable at a certain place, but even in this case it should be presented for acceptance at the domicile or office, for the place of payment is immaterial until after acceptance. If he has removed, diligent inquiry should be made to ascertain his new domicile or place of business, and presentment should be made there. If he cannot be found, or has absconded, the bill should be treated as dishonored.

210. When Should Presentment Be Made.—Under this head it will be proper to consider, (1) the time of day, and (2) the period of time within which presentment for acceptance should be made. It

should be made within the usual business hours, and except in case of a bank, these usually extend until bed-time. It matters not when it be made, provided some authorized person be seen. But if made at an unreasonable hour, and no answer be given, it is a nullity. What might be a reasonable time for one class of business would not be for another.

211. Presentment within a Reasonable Time.—The bill should be presented within a reasonable time after its receipt, and unless it is, the drawer will be discharged, even though he has suffered no damage by the delay. What is a reasonable time must be determined from the facts of each case. A more definite rule cannot be laid down. Great latitude will be given when the bill goes into circulation, and each holder retains it only a short time. The facilities for communication between the parties will also be considered. A delay of twenty-one days to forward sight drafts received at Detroit and drawn on Chicago, was held by the court to be too long. It should not be presented on a holiday.

212. Excuses for Delay in Presentment.—There are some reasonable excuses such as sickness, inevitable accidents, war, etc., that will excuse delay. But they must be beyond the holder's control. Presentment is also excused when the drawee is dead though it may be presented to the personal representative. It is also excused if the drawee has absconded or does not have capacity to contract.

213. How a Bill Should Be Presented.—The holder should make an actual exhibit of the bill to the drawee or his agent, and request acceptance. The drawee can insist on writing his acceptance on the face of the bill, and this he cannot do unless it be actually presented. The drawee has the right to hold the bill for twenty-four hours to examine his account with the drawer, and determine whether he will accept the bill or not. If he neglect or refuse to return the bill it can, by the statutes of some states, be considered as accepted.

214. Incompetent Drawee.—The drawer's implied contract with the payee is that the drawee is competent to accept. If therefore, the holder finds on presentment that the drawee is incompetent, for instance, is an infant, an idiot, or lunatic, he may protest the bill at once, even though the drawee is willing to accept.

215. Qualified Acceptance.—Any form of acceptance that introduces a new condition into the instrument, or that varies in any way

its tenor, is called a "qualified acceptance." The holder can insist on an unconditional acceptance or none, indeed, if he accept a qualified acceptance he thereby releases the drawer from all liability. According to the general rule of decisions, a draft may be accepted payable at a particular bank in the city where the drawee lives, and it will not be such a conditional acceptance as will release the drawer, but the drawee should not be permitted to make it payable outside of the city where he lives or it will release the drawer and endorsers. *75 Ga. 33.* (See form, sec. 205.)

216. What Acceptance Admits.—By the act of acceptance the drawee admits the signature of the drawer, and he cannot afterwards deny it, even though the draft prove to have been forged. It admits that he has funds of the drawer's in his hands, and also that the drawer is competent to contract. But it does not admit that the body of the draft has not been altered since it left the drawer's hands. It also admits the capacity of the payee to endorse.

217. Proceedings for Non-Acceptance.—If the drawee refuse or neglect to accept the draft when a proper presentation has been made, or when presentation is excused, the bill is said to be dishonored, and notice should be immediately sent to all who are *conditionally* liable. This includes all endorsers and the drawer. If the bill be a foreign one, it should be protested, and then notices should be sent. If the draft is by its terms due a certain number of days from date, while it need not be presented for acceptance, yet it is the holder's privilege to do so, and if acceptance be refused, notice should be sent as before described, and suit can be instituted against the drawer and prior endorsers at once.

This doctrine of notice applies only to drawers and endorsers of negotiable instruments, and the rule need not be observed in case of non-negotiable paper. It is regarded as part of the drawer and endorser's contracts, that they will only be liable in case of proper demand and notice.

FORM OF ACCEPTANCE OF DRAFT, PAYABLE "AFTER DATE,"

ACCEPTED.
JOHN DOE.

IF PAYABLE "AFTER SIGHT,"

ACCEPTED.
Aug. 15, 1901.
JOHN DOE.

TO MAKE PAYABLE AT BANK,

ACCEPTED.
August 15, 1901.
Payable at
Merchants National Bank.
JOHN DOE.

CHAPTER XXI.

PRESENTMENT FOR PAYMENT.

218. Why Necessary.—The acceptor of a bill and the maker of a note engage absolutely to pay the paper on the day of its maturity. No presentment is necessary in order to charge them. Being unconditional debtors it is their business to seek the holder at maturity and pay him. But the engagement of the drawer and endorser of a bill, and the endorser of a note, is conditioned that proper presentment be made to the one primarily liable. *It is, then, for the purpose of charging those who are secondarily liable that presentment for payment should be made.* When a draft is once accepted the drawer and endorsers are in exactly the same position as the endorsers on a note, hence, whatever is said on the subject of presentment for payment applies equally well to that of notes, accepted drafts, or drafts due at a certain time.

219. By Whom Should Bills Be Presented for Payment.—Payment may safely be made to any one who appears by the paper itself or its endorsements to be the holder. But mere possession of a note or bill is not, aside from its endorsements, evidence of the right to receive payment. In this respect it will be noticed, that the rule of presentment for acceptance differs from this. It has been repeatedly decided that where a paper fell accidentally into the hands of persons who, without authority, presented it for payment, which was refused, and who thereupon gave notice to the endorsers, the notice inured to the benefit of the rightful holder. If the holder die before the maturity of the paper, the presentment should be made by his personal representative, and if done within a reasonable time after his appointment, it will be sufficient to charge the drawer or endorsers.

220. To Whom Should Bills Be Presented for Payment.—Presentment should be made to the acceptor or maker, or his legally authorized agent. If the acceptor or maker be dead it should be presented to his personal representative, if one be appointed. If there be no

personal representative appointed, presentment should be made at the dwelling house of the deceased, but if the paper is payable at a particular place, it should be presented there. If the paper be joint, presentment should be made to both debtors, and if they reside far apart due diligence only is required to reach the second as soon after maturity as possible.

221. On What Day Should Bills Be Presented for Payment.—Presentment should be made on the very day of maturity, provided it is possible. If made before it is a nullity. If made after, the burden of proof lies on the holder to show that he had a valid excuse for the delay. In order to hold the drawer of a check, the holder should present it within twenty-four hours of his receipt of it. Each endorsee may hold it twenty-four hours, and still hold his endorser, but if all parties are in the same city as the bank on which the check is drawn it should be presented on the next business day after its issue or the drawer will be released in case of the failure of the bank.

222. Drafts Payable on Demand.—A bill payable on demand is payable immediately on presentment, and without grace. It is in every respect similar to a check, and where the parties reside in the same place presentment should be made at once upon its receipt, and in any case within a very short reasonable time. A note payable on demand, when intended as a continuing security, may be held longer. Many states have statutes settling this question definitely.

223. Holidays.—In fixing the maturity of negotiable paper the question as to what are legal holidays becomes important. Each state has by statute selected its own holidays, and reference must always be had to the statutes of the particular state where the question arises. Christmas and Fourth of July are in all states holidays, and in many states the Twenty-second of February is so considered. (See section 189.)

224. At What Hour Should Bills be Presented for Payment.—If the paper is payable at a bank, presentment should be made within banking hours. If the paper is not payable at a bank, presentment may be made at any time before bed-time, but a presentment made at any hour is good, provided a competent person be seen who refuses payment.

225. Where Bills Should Be Presented for Payment.—When the paper is payable generally, that is when no place is designated, it should be presented at the home of the acceptor or maker, or his place of business. If a paper is payable at a certain town it is sufficient if presented at all the banking houses of the town, provided the acceptor or maker have no domicile in the town. If the debtor has abandoned his place of business at the time the paper matures, presentment should be made at his house. A demand made of the debtor on the street is good, unless objected to as an improper place. At any rate, due diligence must be made to find the principal debtor and present the paper to him. If the paper is made payable at a particular place, presentment should be made there.

226. How Should Bills Be Presented for Payment.—Presentment should be made by an actual exhibition of the paper, or at least the debtor should clearly understand that the instrument was ready to be delivered. The presentment of a paper payable at a certain bank is good if it is in the bank at maturity, ready to be delivered up to any one who may be entitled to it on payment of the amount due. No further presentment is necessary.

227. Payment.—If payment is made, the drawer and endorser of a bill and the endorser of a note, are immediately relieved. This statement is made on the assumption that payment is made to the party entitled to it, or at least is entitled to it so far as the paper discloses.

228. Protest.—When a note or bill has been dishonored, the holder requires some legal evidence of having performed all the conditions precedent of his contract with the drawer and endorsers, that he can use in case he is obliged to bring suit against them. The best evidence is a Protest. In case of a foreign bill a protest is the only evidence that is allowed, hence a protest in this class of paper is absolutely essential. Not so however, in case of an inland bill, which may or may not be protested.

A certificate of protest is required in case of a foreign bill, in order to afford authentic evidence of dishonor to the drawer, who from his residence abroad would have much difficulty in determining whether due steps had been taken or not. We therefore see that it is for the interest of both parties. It obviates the attendance of witnesses, and preserves evidence that might otherwise be lost through death.

State of Iowa, }
Lee County, } *ss.* **Be it Known,** *That on this 18th day of July, in the year of our Lord one thousand nine hundred and one, I, Thomas B. Camp, a Notary Public, duly commissioned and sworn, and residing in the City of Keokuk, in said County and State, at the request of O. M. Powers, went with the original draft, a copy of which is hereto attached, to the office of W. J. Frisbee, and demanded payment thereon, which was refused.*

Whereupon I, the said Notary, at the request of the aforesaid, did **PROTEST,** *and by these Presents, do* **Solemnly Protest,** *as well against the drawer of said draft and the endorsers thereof, as all others whom it may or doth concern, for exchange, re-exchange, and all costs, charges, damages, and interest already incurred by reason of the non-payment of the said draft.*

And I, the said Notary, do hereby certify that on the same day and year above written, within forty-eight hours from the time of such protest, due notice of the foregoing Protest was put in the Postoffice at Keokuk, Iowa, as follows: Notice for M. L. Walker, Bushnell, Illinois, and notice for D. E. Zook, Chicago, Illinois. Each of the above named places being the reputed place of residence of the person to whom this notice was directed.

(Place for Seal.) **In Testimony Whereof,** *I have hereunto set my hand and affixed my Official Seal, the day and year first above written.* THOMAS B. CAMP,
Notary Public.

CERTIFICATE OF PROTEST.

It is the solemn protest of the holder against any loss on account of non-acceptance or non-payment, and the calling of the notary to bear witness that all due steps have been taken to fix the liability of the drawer or endorser. This protest, being under the official seal of the notary, is recognized by all foreign courts in the same manner that our courts recognize them.

The notary should take the note, and presenting it to the acceptor or maker, demand payment. As soon as demand has been made, and on the same day, if the paper be dishonored, the notary makes a record in his book of registry, of all the facts concerning the presentment, including the date and the amount of his charges. From this record the formal protest is made out. It is essential that the record spoken of above be made on the very day of the demand, for the notary must not trust his memory until the next.

N. I., Sec 266.—When the acceptor has been adjudged a bankrupt or has made an assignment for the benefit of creditors before the bill matures the holder may have it protested for better security.

229. What Protest should Contain.—The notarial certificate of protest should contain:

1. Time of presentment.
2. Place of presentment.
3. Fact and manner of and reason for presentment.
4. Demand of payment or acceptance.
5. Fact of dishonor.
6. Name of party by whom presented.
7. Name of party to whom presented.

And in reference to notice it should state:

1. Person notified.
2. Manner of notification.
3. When not served in person, where and in what manner notified.

230. Notice should Contain.—It was formerly thought necessary to send to the drawer or endorsers a copy of the protest, with the notice of dishonor, but it is now settled that only the notice is necessary. But when the trial comes on the protest must be produced when a *verbatim* copy of the paper is usually attached to the protest.

In case of inland paper, while no protest is necessary, yet notice to the drawer or endorsers is absolutely so. This notice may be either verbal or written, but written notice is preferable. No particular form is necessary. The main object being to inform the party that the paper has been dishonored, and that the holder looks to him for payment. This notice should be sent to all whom the holder expects to hold liable, and if the parties reside in the same place, notice should be served not later than the day following the day of dishonor. If they reside in different places the notice must be sent by the first mail after the day of dishonor. Notice sent by the holder inures to the benefit of all subsequent endorsers, but in order to be safe, each endorser should notify all endorsers before him, and for this he is allowed one day after he is notified.

231. Charges of the Notary.—It is the custom for the drawer or endorser to pay the notary's charges, but they are only a legal charge where the protest was required by law. The custom is so general to pay them that it may well be questioned whether they could not now be collected.

232. Waiver.—The necessity for demand, protest and notice may be waived by the drawer or endorser. This is usually done in writing on the paper itself. No set form is necessary, provided the intention be clear.

FORM OF WAIVER.

I hereby waive demand, protest and notice of non-payment.

J. A. Lyons.

This waiver can often be secured at the time the paper is bought, and it is a matter of prudence to secure it, especially when the parties reside at a distance.

CHAPTER XXII.

QUASI NEGOTIABLE INSTRUMENTS.

233. Explanation.—Quasi negotiable instruments include all that class of written contracts, that, while not accorded the full privileges of negotiable paper, yet neverthless enjoy many of them. They occupy a kind of middle ground between negotiable paper and the ordinary contract.

BILLS OF LADING.

234. Definition.—A bill of lading is a written acknowledgment by the representative of a common carrier that he has received the goods therein described, to be carried and delivered upon the terms stated, to the person therein specified. It is both a receipt and a contract and in so far as it is a receipt it may like all receipts be explained or denied by parol evidence. This is so even when it has passed into the hands of a *bona fide* holder. In this respect it lacks much of being a negotiable paper.

235. Explanation.—The idea of making bills of lading negotiable has evidently arisen from the use to which they are put. This may be well illustrated by the following:—

Clark purchases a bill of goods from Evans in a distant city and orders them sent by a certain line of railway. Evans sends them as directed, getting a bill of lading which he sends to Clark by mail. Before the goods arrive Clark finds a customer for them. He makes

the best delivery of the goods possible under the circumstances by endorsing and delivering the bill of lading. From this it is but a step to the negotiable paper. The bill of lading when endorsed passes the title to the property.

236. Effect on Stoppage in Transitu.—In the illustration used in sec. 235, if Clark bought the goods on credit and should become insolvent while they are *en route*, Evans would have the right to notify the carrier to withhold delivery from Clark. He could do this even if Clark had received a bill of lading but he could not do so if Clark had previously negotiated it to a *bona fide* holder for value. In this respect it resembles a negotiable instrument. (See sec. 306.)

237. How Used, etc.—A bill of lading for goods sent as per order and a draft for the purchase price may be sent together by the consignor to the consignee. In this case the draft must be honored or the goods cannot be retained, for the consignee gets no title to them. Or the consignor may ship the goods to his own order, draw a draft on the vendee for the price, pin the draft and bill of lading together and deliver them both to an endorsee, usually his bank, for value. This keeps the possession of the goods from the vendee until the draft is honored when the bill of lading will be properly endorsed and delivered to him, thus enabling him to secure the goods from the carrier. This is practically sending goods by freight C. O. D.

238. Who May Transfer, etc.—Only the consignee can pass legal title to the goods by an endorsement of the bill of lading. The consignor is not the proper person to endorse unless he also be consignee or it be made to his order.

239. How Endorsed, etc.—A bill of lading may be endorsed by any of the modes of endorsing negotiable paper. It may be endorsed with conditions and all subsequent endorsees take it subject to the conditions. Even the carrier must observe that the condition is performed.

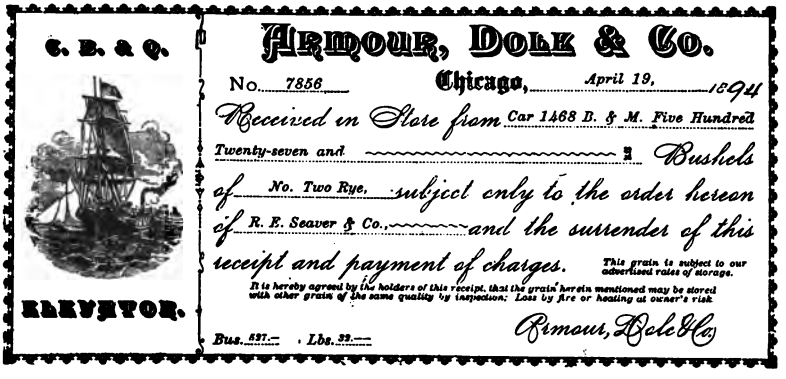
Not being strictly negotiable instruments one who endorses them does not incur the liability of an endorser. *101 U. S. 557.*

240. Title, etc.—Unlike negotiable paper no better title can be given the endorsee of a bill of lading than the endorser had. As a result of this if a bill endorsed in blank be lost or stolen or obtained

by fraud the thief or finder could not confer a good title upon even an innocent purchaser for value. *29 Minn. 95 U. S. 92, 51 Pacific Rep. 461.*

WAREHOUSE RECEIPTS.

241. What Are.—When goods of any kind are delivered to a warehouseman for storage, a warehouse receipt is given. No set form is required, hence they vary in details yet the object is always the same. We shall learn in the subject of *Bailments* that the liability of a warehouseman is fixed by the common law independent of receipt. But the liability is now quite generally modified by statute. Like a bill of lading a warehouse receipt is both a receipt and a contract.


C. B. & Q.

ELEVATOR.

ARMOUR, DOLE & CO.

No. 7856 Chicago, April 19, 1894

Received in Store from Car 1468 B. & M. Five Hundred Twenty-seven and ~~~~~ Bushels of No. Two Rye, subject only to the order hereon of R. E. Seaver & Co., ~~~~~ and the surrender of this receipt and payment of charges. This grain is subject to our advertised rates of storage.

It is hereby agreed by the holders of this receipt, that the grain herein mentioned may be stored with other grain of the same quality by inspection. Loss by fire or heating at owner's risk.

Armour, Dole & Co.

Bus. 527.— Lbs. 29.—

WAREHOUSE RECEIPT.

242. How Used, etc.—The instrument becomes of interest in a commercial sense in the same manner as a bill of lading by being the means of effecting a delivery of personal property not in the seller's possession. This is well illustrated by the grain business. In large cities, elevators are erected for the storing of grain for a fee. A carload is sent to a certain elevator by the commission merchant and a warehouse receipt is delivered for it. The grain is thrown in with other grain of its kind and quality and no pretense is made of re-delivering the identical grain. These receipts when sold are endorsed and delivered to the buyer. While an endorsement of this kind will give to the endorsee the right to claim the amount of goods represented in the receipt, yet independent of a statutory regulation, such an instrument is not fully negotiable.

LETTERS OF CREDIT.

243. Explanation.—A letter of credit is used when persons are traveling abroad in the following manner: A, the tourist, deposits with his home banker the amount of money which he thinks he may

First National Bank of Chicago

No. 1739. Chicago, May 16. 1894

Gentlemen.

This letter will be presented to you by Martin Beem, in whose favor we beg to open a credit with you collectively for the sum of Five Hundred **Pounds Sterling,** to which extent be pleased to furnish payments in sums as required, inscribing the amount so paid on the back of this letter. In reimbursement you will take his draft on the City Bank of London, inserting therein the date and number of this credit, which we engage shall meet with due honor

Your charges are to be paid by the bearer hereof.

Requesting for him your best attention, we have the honor to be

Gentlemen,

£ 500. Your obedient servant,

L. J. Gage,
Cashier.

This Credit is in force until January 1st, 1895.

Signature of

Martin Beem.

This letter must be returned with the last draft.

LETTER OF CREDIT.

need while abroad. For this the banker gives him a letter of credit directed to his foreign bankers. Against this letter A may draw at such times and in such amounts as he may need, up to the amount of the letter, calling upon any foreign banker mentioned in the letter. Had his banker drawn on any one of the foreign bankers for the whole amount of the deposit this would have been a bill of exchange and of course fully negotiable. Although transferrable by endorsement they are usually treated by the courts the same as a non-negotiable contract.

COUPON BONDS.

244. History.—It has been said that the manifest disposition of the present age to swell the list of negotiable instruments cannot be better illustrated than by the history of coupon bonds. This was a kind of instrument but little known forty years ago but now they are much used by both corporations and individuals. It is now well settled that coupon bonds of a corporation *if lawfully issued* are commercial securities and so far negotiable that a *bona fide* holder purchasing them before maturity will take them free and clear of any defenses existing in the hands of the original holder. These instruments are nearly always payable "to bearer" and are passed by delivery. For this reason the law is not yet settled as to what extent the holder shall be protected who takes them as bearer, instead of as endorsee, and in this respect they cannot yet be said to be fully negotiable. The coupons are transferrable in the same manner as the bond itself, and are independent of it.

PRACTICAL REVIEW.

I. A gives his note to B payable in wheat. C innocently purchases the note from B for value before maturity, and in the usual course of business, but at maturity A refuses payment, claiming that the paper was secured without consideration. Can C collect it from A?

II. A secures B's note without consideration and endorses it before maturity, and for value to C, who has knowledge of the lack of consideration. Can C collect it from B?

III. In the above case, suppose C purchased the paper innocently, and then transferred it to D, who had knowledge of the lack of consideration between A and B. Could D collect it from B?

IV. What would be your answer to No. 3, provided the sale from C to D was after maturity?

V. A playfully writes his name on a blank paper and hands it to B. B fills out a promissory note above it and at once sells it to C, who is innocent of the transaction. Can C collect it from A?

VI. A owing B $100 writes and signs a promissory note for that amount,

payable to B or bearer, intending to deliver it next day. A locks the paper in his safe, but in the night a burglar breaks open the safe, gets the note and sells it to C, an innocent purchaser, for value and before maturity. C, after maturity, sells it to D. Could any of these parties collect the note from A? If so, which ones?

VII. A sells a bill of goods to B for $1,000, for which B endorses to A C's note, payable at the First National Bank, of Chicago. At maturity C is insolvent. What steps must A take to hold B?

VIII. Suppose that A draws a draft on B, in favor of C; but B has no funds in hand belonging to A. What steps must C take to charge A?

IX. A's name is forged to a check, which gets into the hands of an innocent purchaser, B, to whom A's bank pays it. On discovery of the forgery can the bank recover the amount from B?

X. Suppose a note reads: I, J. S. Lee, president of the E. & M. Ry. Co., promise to pay, etc., and is signed J. S. Lee, pres't E. & M. Ry. Co., whose note is it?

XI. A, in consideration of B's promise of forbearance to prosecute him criminally, gives his negotiable note to B. B endorses it to C, who takes it before maturity, for value, without notice. C endorses it after maturity to D who endorses it for value to B. Could any of these persons, while holding it, have enforced it against A, and if so, which ones?

XII. Write a negotiable promissory note for $250, at three months, and state the day of the month when the same will mature. Also a draft for same amount and time, and give the technical names of all the parties.

XIII. A makes his note to B's order, and before delivery C signs his name on the back. B endorses it over to D. What is C's liability?

XIV. A forges the name of B as drawer of a draft payable to himself, at ten days' sight. The drawee accepts and the bill passes by endorsement to C, an innocent holder, for value, and before maturity. What are the rights if any, of each holder against the acceptor?

XV. A note payable "to order" was endorsed by A to B, "without recourse." B endorses in full to C. The note proved to be a forgery, and the maker refused payment. Can C collect from B? If so what steps must he take? Can he collect from A? Why?

XVI. A gives his negotiable note to B for $475. B alters the amount so that it calls for $575, and endorses the paper in full to C for value, before maturity, C knowing nothing of the alteration. Can C collect the $475 from A? What is the liability of A? Are there any circumstances under which he would be liable for the $575? If so, what are they?

XVII. A gives B his note payable "to order," and B endorses it "Pay C only." Can C transfer the paper again by endorsement?

XVIII. Suppose the same conditions to exist as in No. 17, only B's endorsement reads "Pay C." Can C transfer the paper by a further endorsement?

XIX. Give the facts of a case in which A, in his own name, would have the right to sue B, though they never had any dealings with each other, and B does not even know of the existence of A.

XX. A gives B his non-negotiable note, which B transfers to C by an endorsement in full. What is the liability of A, and in case B owes A on account, can C collect the note from A?

XXI. In the above case what steps would C have to take in order to charge B in the event of A's insolvency?

XXII. On the 18th of August A gave B his check in payment of a debt. B presents the check at the bank on the 20th, but the bank has failed, closing its doors at the close of business hours on the 19th. On whom will the loss fall, and why?

XXIII. In the above case, suppose that on the 19th B endorsed the check

to C, who goes on the 20th to present it, but finds the doors closed, as did B. On whom will the loss fall?

XXIV. A bought goods of B on credit, and at the expiration of the credit endorsed over C's note for the amount. B does not present the note for payment when due, but sues A. Will he get judgment? Why?

XXV. In the above case, if B presents the note for payment, and C is insolvent, can B then collect his bill from A? Has he any recourse to A at all, and if so, on what?

XXVI. A has a good defense against B to his note made to B's order. Before maturity, to pay an old debt of his own, B assigns the note to C, who takes it without knowledge of A's defence. Can C recover on the note?

XXVII. A drew his check in favor of B for $100. B endorsed it over to C, who raised it to $190. On presentation at the bank it was paid. Can the bank recover from C, and if so, how much? Are there any circumstances under which A or B would be liable?

XXVIII. A gave his note to B at 60 days. After the note was given B was adjudged a lunatic, and a conservator appointed for him. B, however, still retained the note and sold it to C for value. C endorsed it without recourse to D, who held it at maturity. What is C's liability?

XXIX. A engaged B to make a large purchase of corn for him, and left with him for that purpose a blank promissory note signed. B did not make the purchase, but filled out the note for a large amount and endorsed it over to C for value before maturity, C knowing nothing of B's bad faith. C endorses it for value to D, who knew of the origin of the paper. Can D collect it?

XXX. B sends his collector to A for a settlement of his account. A gave him his check payable to B or bearer, but on his return the collector lost the check. Can B stop payment of the check by notifying the bank?

XXXI. A, a minor, was indebted to B. He gave in payment his note. which B endorsed in full to C. Is A liable to C? Is B liable?

XXXII. In the above case suppose B had endorsed without recourse. Would he then be liable?

XXXIII. A purchased from B a bill of goods to the amount of $200. A gave him, without endorsement, C's note payable to bearer for $200. Suppose C is a minor; (2), Suppose C's signature be forged; (3), Suppose C prove to be insolvent is A liable in any case?

XXXIV. A draft on B payable to C and purporting to be drawn by A was presented to B and he accepted it. B afterward learned that A's signature was forged and when the draft was presented for payment by D, an innocent endorsee, B refused to pay it. What are the rights of the different parties?

XXXV. A note is payable to L. M. Swift and he wishes to transfer it to C. M. Miller without becoming responsible for its payment. Write his endorsement.

XXXVI. Suppose he wished to endorse it so it would not be further negotiable, how could he do it?

XXXVII. A. C. Rogers is the holder of a negotiable note. Write an assignment of this note to Robinson & Co.

XXXVIII. What is the legal effect of this assignment?

XXXIX. A note payable to order was stolen from the owner and his endorsement forged thereon. After passing through several subsequent holders' hands the owner discovered the note in a bank. What are his rights as against the bank, can he secure the possession of the note and if so what is the name of the action he must bring?

XL. A, when presenting a negotiable promissory note inserted the words "presentment, demand, notice and protest waived." At maturity the

note was not paid, in fact was not even presented. Is this endorser liable nevertheless, and why?

XLI. A gives his note to B payable at Union National Bank. B presents the note there at maturity. Is the bank authorized to pay it and deduct the amount from A's account.

PRACTICAL CASES.

No. 1.

$1100.00 Jersey City, N.J. Jan. 20, 1900.

Three months after date we promise to pay to the order of H. Swift & Co.

Eleven Hundred Dollars

at First National Bank of Jersey City, N.J.

Value received: Wm. T. Wallis, Prest.

No. Due. Geo. T. Smith, Treas.

This note was written on a blank across the end of which was printed "Wallis Iron Co." It was supposed to be a company note and was sold and endorsed by H. Swift & Co. Not being paid at maturity the endorsee brought suit against Wallis and Smith individually and the court decided it was an individual and not a corporate note. *150 N. Y. 455. 162 Ill. 241.*

No. 2.

$3700.00 Duluth, Minn., Oct. 1, 1900.

Four months after date we promise to pay to the order of W. B. Russell

Thirty-seven Hundred Dollars

at First National Bank,

Value received: Twin City Mineral Company,
By C. T. Adams, Prest.

No. Due. Edwd. T. Jones.
C. B. Warren.

This note was endorsed { W. B. Russell. / J. B. Logan.

When taken to the bank by the Mineral Co. for discount C. B. Warren's name was not on the note and the bank suggested that his signature be procured, which was done. Not being paid at maturity suit was brought on the note, but the court decided that the procuration of Warren's signature as a joint maker so altered the contract as to release Jones and the endorsers. *90 Ind. 515.*

No. 3.

$555.00 Rockville, Ind., Oct. 27, 1900.

Two five months after date I promise to pay to the order of Wm. E. Livermore, Cashier,

Five Hundred Fifty-five ——— Dollars

at First National Bank,

Value received.

No. ——— Due ———

Thomas Patton, Admr.
John Lamey,
Silas Carpenter

An administrator or executor who makes, accepts or endorses negotiable paper is personally liable thereon although he add to his signature the title of his office. *30 S. E. Rep. 331. 57 Ind. 269. 52 Ill. 342. 132 Mass. 285. 52 Minn. 1.*

No. 4.

$678.24 New York, N. Y., Nov. 27, 1900.

Two months after date I promise to pay to the order of B. W. Spangler

Six Hundred Seventy-eight 24/100 ——— Dollars

at First National Bank.

Value received.

No. ——— Due ———

E. R. Farr

This note was endorsed in blank by B. W. Spangler and negotiated. By such an endorsement what does Spangler guarantee? *19 Vt. 203. 20 N. Y. 226. 38 Iowa 329. 22 Kan. 157.*

How can he avoid a portion of this liability?

How can he avoid it all?

No. 5.

$15000.00 St. Louis, Mo., Dec. 3 1900.
On February 1st after date, The Park Hotel Co. promise to pay to the order of Ed. Rogers,
Fifteen Thousand ——— Dollars
at Fourth National Bank
Value received. The Park Hotel Co.
No. ——— Due. ——— By Ed Rogers. President.

This note was endorsed "Ed. Rogers." It is a corporate note drawn by its president in his own favor. The court decided that this was sufficient to put the purchaser on his guard and that it was not negotiable.

No. 6.

$947.70 Houston, Tex., Nov. 4, 1900.
Three years after date I promise to pay to the order of H. O. Simonton
Nine Hundred Forty-seven 70/100 ——— Dollars
at with interest.
Value received. This is one of five notes given in payment of land
No. ——— Due. ——— J. R. Harrington.

If one of several notes given in the same trade is past due and this is known to a buyer then those not due are non negotiable and are open to the defenses of the maker. *42 S. W. Rep. 1055. 4 Allen (Mass.) 562. 57 Maine 358.*

No. 7.

$5000.00 Evansville Ind. Jan 4 1900.
Ten days after date. Pay to the
order of The First National Bank
Five Thousand & No/100 Dollars
Value received and charge the same to account of
To A. Fitzgerald,
No. New York. Ellis Bros.

Ellis Bros. discounted this draft at the First National Bank on the strength of the following written guaranty:

New York, Dec. 29, 1899.

Messrs. Ellis Bros.:—Any draft you may draw on A. Fitzgerald of this city we guarantee to be paid at maturity.

JOHNSON & WHEELER.

The draft was not paid and the bank sued on the guaranty. The court held it to be a personal guaranty and not assignable. *93 N. Y. 273. 38 Mass. 142. 43 N.J. 125.*

It would seem to be a safe rule not to purchase a negotiable paper relying on a guaranty of it.

No. 8.

$100.00 Detroit, Mich. April 6, 1900.
Four months after date I promise to pay to
the order of J. F. Fish
One Hundred & No/100 Dollars
at First National Bank.
Value received.
No. Due. E. H. Fritch

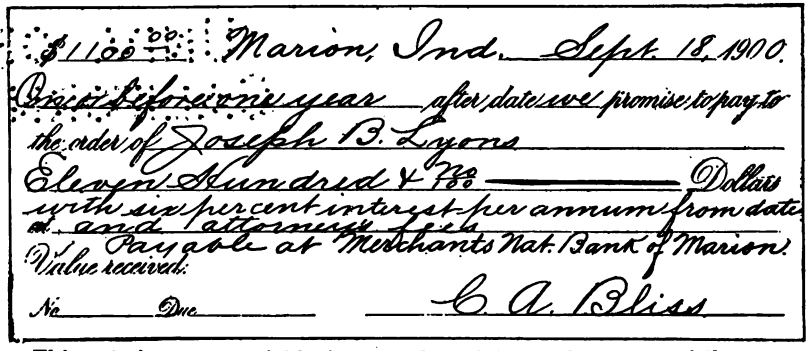
On the back of this instrument appeared the following:

"I hereby transfer my right, title and interest in and to the within note to L. Mitchell.

J. F. FISH."

This assignment it was held destroyed the negotiability of the paper and Fish could not be held as an endorser. An endorsement should have been used instead of an assignment. *39 Mich. 171. 71 Mo. 627. 126 Pa. 194. 101 U. S. 68. 119 Mass. 737. 40 Atl. Rep. 128.*

No, 9.



$1100 00 Marion, Ind. Sept. 18, 1900.

Sixty Days after one year after date we promise to pay to the order of Joseph B. Lyons

Eleven Hundred & 00 Dollars with six per cent interest per annum from date and attorneys fees

Payable at Merchants Nat. Bank of Marion.

Value received.

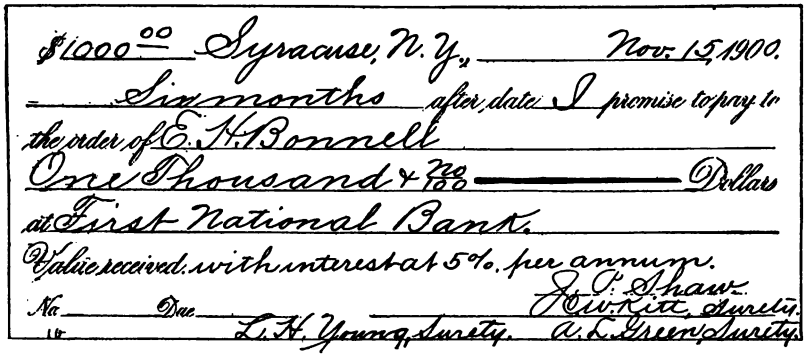
No. Due C. A. Bliss

This note is non-negotiable in a number of States by reason of the agreement to pay attorney's fees. *40 Atl. Rep. (Maine) 128. 68 Mich. 287. 34 Me. 96. 84 Pa. State 409. 63 Mo. 33. 53 Wis. 599. 27 Minn. 240.*

The rule is otherwise in some States, including Illinois and Indiana.

The N. I. law makes such paper negotiable.

No. 10.



$1000 00 Syracuse, N. Y., Nov. 15, 1900.

Six months after date I promise to pay to the order of E. H. Bonnell

One Thousand & 00/100 Dollars at First National Bank.

Value received. with interest at 5% per annum.

No. Due J. C. Shaw.

L. H. Young, Surety. A. L. Green, Surety. H. W. Kitt, Surety.

This paper was endorsed, E. H. Bonnell.

Shaw, the maker, wishing to secure Kitt against loss on the paper, gave him a mortgage on property worth at least one-third of the amount of the note. The court held that this mortgage inured to the benefit of all the sureties alike. *46 S. W. Rep. 291. 62 Tex. 141.*

No. 11.

$360.00 Chicago, Ill., May 16, 1900.

Ten days after date Pay to the order of C. P. Kellogg

Three Hundred Sixty 2/100 Dollars

Value received and charge the same to account of three carloads of corn shipped this day.

To C. G. White, No. 83 Broad St., New York. Chas. H. Whitman Co.

This draft is not negotiable because drawn on a special fund. *25 N. Y. 239. 75 N. Y. 370.*

If not paid at maturity what steps must be taken by the holder to charge Kellogg, he having endorsed it in blank and negotiated it?

No. 12.

$300.00 Columbus, O., Oct. 23, 1900.

At sight Pay to the order of Francis Neagle

Three Hundred Dollars

Value received and charge the same to account of

To John Doe, No. Hoboken, N. J. C. A. Bliss.

Endorsed, Francis Neagle, Wm. O. Brown.

This draft was forwarded to a N. Y. bank for collection. It permitted it to be accepted payable in N. Y. instead of Hoboken, N. J.. This released the drawer and endorsers. *19 N. Y. 480. 11 O. State 38.*

No. 13.

$1382.00 Crookston, Minn. July 26, 1900

Four months after date we promise to pay to the order of J. C. Martin Lumber Co.

Thirteen Hundred Eighty-two 00/100 Dollars.

Payable in New York or Chicago Exchange

Value received with interest at 6% per annum

No. 342 Due Nov. 26/29. J. Arthur Lyons.

J. C. Martin Lumber Co., by E. L. Martin, Treas.

This note was transferred by the above endorsement to a N. Y. bank. Suit was brought on it against the maker who had a defense as against the Lumber Co. The Supreme Court of Minn. decided that it was not negotiable because payable in New York or Chicago exchange which was not money. *69 N. W. Rep. 1148. 44 Pa. 454. 18 Wis. 481. 4 Mass. 245. 64 N. C. 381.*

REVIEW QUESTIONS.

1. What is a negotiable paper? 2. What is the difference between negotiability and transferability? 3. What are the necessary elements of negotiable paper? 4. What are the proper conditions of transfer? 5. Who may be parties to negotiable paper? 6. Is a note or order payable in a specific chattel negotiable in your state? 7. What are negotiable words? 8. What is meant by saying that a negotiable paper must be payable absolutely? 9. What was the first negotiable paper? 10. What papers are now negotiable at common law? 11. What is a draft? 12. Explain how a draft is used. 13. Draw a draft from memory. 14. How many parties are there to a draft? 15. How are parties to negotiable paper divided? 16. Give the technical names of the parties to a draft. 17. Has the holder of a draft a right of action against the drawer? 18. What is meant by accepting a draft? 19. What is a joint note and how does it differ from a joint and several note? 20. What is an accommodation note, and can it be collected? 21. Are there any peculiar words necessary to make paper negotiable in your state? 22. What is a judgment note, and of what advantage is it? 23. What is a check? 24. Who can stop payment on a check? 25. Explain the different methods of keeping accounts with banks. 26. What is a post dated check? 27. What is a certified check? 28. Why should a check never be drawn payable to bearer? 29. How does a check operate as a receipt? 30. What is a certificate of deposit? 31. What is meant by transferring a paper "for value"? 32. What are the objects of endorsement? 33. Where should endorsements be made? 34. Describe the common forms of endorsements. 35. What is the endorser's contract? 36. What is the contract of one who transfers a negotiable paper without endorsement? 37. What is the liability in your state of one who endorses before the payee? 38. What drafts must be presented for acceptance? 39. Why? 40. What is the effect of acceptance? 41. Explain fully how, when, and where, presentment should be made for acceptance. 42. What does the acceptor admit? 43. What

steps should be taken if acceptance be refused? 44. Why is it necessary to present paper for payment? 45. Explain fully how, when, and where, presentment for payment should be made. 46. What is a protest, and by whom should it be made? 47. To whom should notices be sent? 48. What is a quasi negotiable instrument? 49. What is a bill of lading? 50. How does it resemble a negotiable instrument, and in what respects does it differ? 51. How is a bill of lading used? 52. How should a bill of lading be endorsed? 53. What is a warehouse receipt? 54. Explain its use. 55. What is a letter of credit? 56. How is it used? 57. What is a coupon bond? 58. Is it a common form of paper?

GUARANTY AND SURETYSHIP.

CHAPTER XXIII.

245. Definition.—A guarantee is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is in the first instance liable for such payment or performance. It is a kind of suretyship as is also the contract of endorsement. A surety is generally a co-maker, that is he signs the instrument with the maker, or adds the word surety to his name to indicate the capacity in which he binds himself.

A talks with his banker about the loan of $1,000. The bank agrees to lend him the money if he will give it the joint note of himself and B. They may sign the note as joint makers but as to the bank B is only a surety.

246. Liability of Surety.—The surety is absolutely liable as soon as default is made, and no demand upon the principal or notice of his default is necessary. It is the surety's duty to seek the creditor at maturity and see that the debt is paid.

247. Guarantor's Contract.—A guarantor either signs another paper entirely from that signed by his principal, or signs the same paper, but in such a way as to make his a contract to pay, *under certain conditions*, the debt of another. A surety makes the principal's debt his debt. A guarantor cannot make himself a co-maker.

248. Guarantor's Liability.—A guarantor's liability is less stringent than that of a surety. Unless demand is made upon the principal within a reasonable time, and notice given in case of default, the guarantor is discharged *to the extent that he may be damaged by the delay*. If in the meantime the principal has become insolvent, so that the guarantor cannot have recourse to him, he cannot be held. In this respect the contract of guaranty is more onerous than that of endorsement, for an endorser is *absolutely* discharged without reference to his loss, which is conclusively presumed. From this we see

that a guarantor's liability is secondary and collateral, and not like a surety's, which is primary and direct.

249. In Writing, etc.—A contract of guaranty being a contract to answer for the debt or default of another, must, according to the Statute of Frauds, be in writing. It may, and frequently is, on a separate paper from that of the principal contract, which it guarantees. In the case of notes it is often written on the back. If the guaranty is to pay one's own debt, it need not be in writing. This was held to be so in a case where a third person's note was transferred in payment of a horse, with a verbal guaranty, because it was in reality a promise to pay the amount unless the third person paid it for him.

250. Consideration.—If the contract of guaranty is made at the same time as the principal contract which it insures, the same consideration will do for both, but if it be made at a different date, a new consideration is required. (See sec. 69.)

Some States[1] have held that under the Statute of Frauds not only the promise but the consideration of a guaranty as well must be expressed in writing. But in the majority of States the consideration need not be mentioned, and where it is necessary the words "value received" are usually sufficient. It would, in fact, be safer to use these words in every case.

251. Kinds, etc.—Guaranties are variously divided, the following being the most common and important classes:

KINDS.
- 1. As to Guarantee.
  - *a.* General.
  - *b.* Special.
- 2. As to Subject Matter.
  - *a.* For Payment.
  - *b.* For Collection.
- 3. As to Amount.
  - *a.* Limited.
  - *b.* Unlimited.
- 4. As to Time.
  - *a.* Temporary.
  - *b.* Continuing.

A special guaranty is one directed to a particular person. A general guaranty is directed to whomsoever may accept the offer made.

[1] Alabama, Georgia, Minnesota, New York.

Being in the nature of a proposition, it must be accepted before it is binding, and the guarantee must notify the guarantor. This is necessary that he may know to whom he is liable, and for what amount, that he may take proper steps to protect himself against loss.

In cases of all such guaranties it is safer to notify the guarantor of its acceptance.

Temple, Tex., Sept. 1, 1901.

To any one who shall accept and retain this letter of guaranty, I will guarantee the payment of any bill of goods which may be sold the bearer, G. W. Brown, to an amount not exceeding four hundred dollars. This should be considered for one transaction only.

N. Y. Blair.

GENERAL GUARANTY.

Ross Grove, Ill., Aug. 16 1901.

A. C. McClurg & Co., Chicago, Ill.

Gentlemen: If you will sell the bearer, James Allen, a bill of goods on ninety days' credit, I will cheerfully guarantee the payment thereof to an amount not exceeding one thousand dollars.

Joseph B. Lyons.

SPECIAL AND LIMITED GUARANTY.

252. For Payment.—A holder of a negotiable paper writes on the back thereof:

For value received I hereby guarantee the payment of the within note.

A.

This is an absolute guaranty, for the guarantor is liable immediately on the default of the debtor. But he is entitled, according to the weight of authority, to demand and notice within a reasonable time.

253. For Collection.—If the guaranty be as follows:

For value received I hereby guarantee the collection of the within note.

A.

or

For value received I warrant this note good. *A.*

it is a guaranty for collection. He does not absolutely guarantee the payment of the note, but that the debtor can be made to pay it.

Therefore, before A can be compelled to pay, it will be necessary for the holder to show that the debtor cannot be made to pay it. This can only be properly tested by bringing suit against the debtor, and a failure after due and reasonable diligence to enforce its payment. If the principal debtor were notoriously insolvent, so that suit would be in vain, or had moved to a foreign state, the action need not be brought, but the holder can proceed at once against the guar-

antor. The statutes of some States have practically abolished the rules in regard to endorsers, and have made those "guarantors for collection" who would otherwise be endorsers. In these States, to save the annoyance of bringing suit, it is often required of the transferrer of a note that he also guarantee the *payment* thereof.

254. As to Amount, etc.—A guaranty may be for a certain amount, in which case it is said to be limited, or it may be for an unlimited amount.

255. As to Time, etc.—A guaranty may be either temporary, that is, limited to a single transaction, or continuing. Such a guaranty applies to successive transactions. It is often extremely difficult to determine whether the contract be a temporary or continuing one, and therefore it is best to have the instrument itself state plainly which is intended. If it contains such expressions as "from time to time," or "at any time," or "for any debt, etc.," it is usually construed as a continuing guaranty. A continuing guaranty will cover not only separate bills, but if they are paid and others bought it will cover any balance due within the limit named until extinguished.

Chicago, Ill., July 18, 1901.

J. W. Butler Paper Co., City.

Gentlemen: For all goods that you may sell E. P. Farr, upon the usual terms of credit, I will for value received, guarantee the payment in an amount not exceeding one thousand dollars. You are at liberty to consider this letter a Continuing Guaranty until further notice. *H. Templeton.*

CONTINUING GUARANTY.

256. Guaranty Not Negotiable.—In many States guaranties are held to be non-negotiable. It would seem, therefore, to be an act of prudence to rely but little on an assigned guaranty.

B held A's note, which he sold to C. In selling it he endorsed it in blank and under his endorsement he wrote: I guarantee the payment of semi-annual interest on this note as well as the principal, B. A subsequent holder of the note sued B on this guaranty but the court held that it was personal to the person to whom given.

CHAPTER XXIV.

GUARANTY AND SURETYSHIP—CONTINUED.

257. Surety's Rights.—Mere delay on the part of the creditor will not release the surety. In the absence of statutory provisions he cannot by notice compel the creditor to proceed against the debtor, but (1) he may pay the debt and then bring his action against the debtor; or (2) he can bring an action in equity to compel the debtor to pay the creditor; (3) if he pays the debt and is a co-surety, he has the right of contribution; and (4) he has the right of subrogation. The surety is not compelled to await a suit, but may pay the debt at any time after default. And he can recover in addition from the debtor any interest or costs he may have been compelled to pay.

258. Contribution.—When there are two or more co-sureties or co-guarantors, and one pays the debt, he has the right to compel the others to contribute their share, and may bring an action against them for it.

A, B and C jointly become surety for D. When the debt is due D fails to pay it, and the creditor demands payment of C, who pays it. C now has the right of contribution against A and B to compel them each to pay one-third.

This obligation arises out of an implied promise amongst co-sureties to share the burdens of loss equally.

259. Subrogation.—When a surety pays the creditor he has a right to insist on all the securities which the creditor was entitled to, for the payment of the debt. If the creditor had secured a judgment against the debtor, the surety is now entitled to the benefits of it. This is called the right of subrogation.

260. How Surety Is Discharged.—Of course a surety may be discharged from liability by paying the obligation, but there are numer-

ous ways he may be discharged without payment. The most important are:

I. Fraud practiced on the surety.
II. Diversion from the agreed purpose.
III. Alteration.
IV. Release.
V. Extending time to Principal.
VI. Parting with security.
VII. Death of a joint surety or joint guarantor.

261. Fraud Practiced on the Surety.—When one is induced to become a surety, or, for that matter, a drawer or endorser for another, and there is a misrepresentation or concealment of a material fact, which if known to him would have prevented his entering upon the contract, it is void as to all parties having knowledge of the fraud.

A, securing a position of trust with a corporation, induced B to go on his bond for the faithful performance of his duties for one year. During the year A was found to have embezzled, but nothing was done about it, and the company, relying on his promise to make it good, took his note. The next year B, in ignorance of A's former misdeeds, again became his surety. In a short time A was again an embezzler, when the company notified B of their intention to hold him responsible on his bond. B is not liable, for he has been imposed on.

262. Diversion.—Where a bill is drawn or accepted, or a note made or endorsed for accommodation, with an agreement that it is to be used for a particular purpose, any diversion in its use discharges the accommodation party as to all who have notice of the diversion. Any one taking such a paper with a knowledge of its diversion, is not a *bona fide* holder.

263. Alteration.—Any material alteration in the original or principal contract will, we have found, absolutely release the principal debtor, and if the principal debtor be released so also is the surety. This is making a different contract, one which he never guaranteed. In like manner, if there be any material alterations, such as erasures or interlineations in the contract of guaranty, it releases the surety.

By the N. I. law an innocent holder of an altered instrument may enforce it according to its original tenor.

264. Extending Time to Principal.—The creditor preserves his right against the debtor intact, not for himself alone, but for the benefit of the surety as well. When he relaxes his hold upon the debtor, he impairs the hold the surety would have when substituted (subrogated) in his place. It must be understood that a mere forbearance to bring an action against the debtor will not release the surety.

If this were the case, it would mean that the creditor must proceed against the debtor immediately upon his default; but such is not the law. The forbearance which releases the surety must be granted in pursuance of a *binding legal contract* to that effect. The distinction may be shown as follows: A owes B on a note for which C is surety. The note being due, A goes to B and requests that he give him thirty days more in which to pay. To this B assents. Notwithstanding this arrangement, there is nothing to prevent B from suing A at once, for to make this a binding contract there must be a consideration. B has not made a valid contract to extend the time, and he being thus in a position to proceed against A at any moment, C is not deprived of any of his rights. As to whether the payment of interest is a sufficient consideration to support a promise to extend the time, authorities differ, but certainly the payment of a greater rate, or paying it in advance, will be sufficient. Should the creditor and debtor wish to make a valid extension they should first secure the surety's assent.

265. Parting with Securities.—Upon the payment of the debt the surety is entitled to all the rights, remedies and securities which the creditor could have enforced. The creditor must, therefore, use every care that he do nothing to impair the surety's rights. He must not part with any securities he may have belonging to the debtor, and if he do so, the surety is released to that extent. This has been held so where the surety did not even know of the existence of the security at the time of its release.

266. Death of Joint Guarantor.—By the common law, the death of a joint guarantor releases his estate from the obligation. This rule has been changed by statute in some States.

267. How Guarantor Is Discharged.—A guarantor is discharged by any act of the creditor that would discharge a surety. All that has been said in this connection in regard to surety applies equally well to guarantors. Further, a guarantor may be discharged by failure to make demand, and want of notice. It would perhaps be speaking more accurately to say that his liability in this case had never been perfected.

268. Endorsers and Drawers Become Sureties.—When all steps necessary to charge an endorser or drawer, including demand, protest and notice, have been taken, his contract or liability henceforth is

that of a surety. He may still be released by any of the ways mentioned above, and is governed in all respects as are sureties.

269. Surety Differs from Co-maker.—While the surety makes the principal's debt his own, and is not generally entitled to notice, yet he may be released by the act of the creditor when he would not be released if he were a co-maker. (See sec. 260.) In the order of onerous liability first comes co-maker and then surety, guarantor for payment, guarantor for collection, and lastly endorser.

One who stands sponsor for the faithful performance of an act or service is a guarantor and not a surety.

270. Principal Debt Not Enforceable.—Sometimes a guaranty or surety is requested, because the principal debt it not enforceable, as where a minor asks for credit, which is granted if security be given. In such cases the guarantor or surety is liable even though the principal debtor is not.

PRACTICAL REVIEW.

I. A, a surety, is sued. His defense is that as the principal failed to pay the interest when due, it was agreed between the debtor and the creditor if he (the debtor) would pay it the creditor would give him six months more time on the debt. Is this a good defense, and why?

II. A is surety for B to C. C also held a mortgage on B's property to secure the same debt. On B's representation that he wished to sell the property C released the mortgage. How does this affect A's position?

III. A being a surety on a note which was due and unpaid, was sued. His defense was that the maker of the note was an infant. Is A liable?

REVIEW QUESTIONS.

1. Define a contract of guaranty. 2. How does a contract of surety differ from that of co-maker? 3. Distinguish between surety and guaranty. 4. Distinguish between guaranty for payment and for collection. 5. Distinguish between guarantor and endorser. 6. What guaranty must by accepted and guarantor notified before it is binding? 7. Name the different kinds of guaranty. 8. Name the surety's rights. 9. How may a surety be discharged? 10. What is contribution? 11. What is subrogation? 12. What is an endorser's liability when proper demand has been made and notice given? 13. How will extension of time to principal affect the surety? 14. What will be the effect if the creditor reserves his rights against the surety? 15. What steps must be taken to charge a surety? 16. What to charge a guarantor for payment? 17. What to charge a guarantor for collection? 18. What to charge an endorser?

INTEREST AND USURY.

CHAPTER XXV.

271. Definition.—Interest is the use of money, but the ordinary acceptation of the term is the compensation paid for the use of money. It is usually stated in the contract as a certain *per cent*, meaning a certain per centum of the principal.

272. Legal Rate.—The States have all legislated on the subject, and each has established a rate to be used when the parties have failed to name a rate, and also in cases where the law implies a promise to pay interest. This rate is called the legal rate. It is not always the highest rate that may be agreed upon between the parties, for most States have fixed a maximum rate that may be agreed upon. If there is a maximum rate it is always as high or higher than the legal rate, and the parties may agree upon any rate up to, but not exceeding, the maximum.

273. What Law Governs, etc.—The rate of interest which a contract bears, and also the question whether it bears interest at all or not, are both determined by the law of the place where it is expressly or impliedly to be paid. If no place of payment be specified, it will bear interest according to the law of the place where made. If a bill be drawn in one State for a debt payable there, upon a person in another State, if it is not accepted, and an action is brought against the drawer, the plaintiff is entitled to the rate of interest of the State where it was drawn.

274. On What Interest Is Allowed.—Interest is allowed by agreement on all forms of indebtedness whose face value is or can be determined. It is allowed by implication on all claims that are due and remain unpaid, from the day of their maturity until paid, and on all judgments which the courts have rendered. In all cases where the

rate is fixed by statute, or by implication, the legal rate applies. It will be seen that the measure of damages for the detention of money is the legal rate of interest for the time of detention. If a bill of goods be sold for cash, and the cash be not paid, interest may be collected from the date of sale, at the legal rate until it is paid. If a bill be sold on a credit of sixty days, interest can be collected at the legal rate from and after the expiration of the sixty days.

In case of a note payable on demand, interest begins on demand.

275. Negotiable Paper does not bear interest until maturity, unless it is so stated. But if it says "with use" or "with interest," then the legal rate applies.

276. Annual Interest.—Annual interest occupies a middle ground between simple and compound. Interest is taken on interest accruing directly from the principal, but at simple interest instead of compound. It is allowed in many States by agreement.

277. Compound Interest.—This is interest upon interest, computed at regular intervals. It is not usually favored by the courts, and if agreed upon in advance will not be enforced. If after the interest has become due, the debtor agrees to pay interest on interest it will be upheld, for it is equivalent to an additional loan of that amount. The rules for the computation of interest in case of partial payments, are usually drawn to favor the debtor by avoiding compound interest.

278. Usury is illegal or exorbitant interest. Any rate beyond the maximum rate would be usurious, and hence void. The various States have established a penalty for an agreement to accept usury. As the rates vary in the different States, a contract may be usurious in one and perfectly valid in another. As a rule, if the obligation has been paid the penalty does not apply, and the debtor cannot recover it. All kinds of subterfuges are resorted to to avoid the penalty for usury. Sometimes the borrower is required to take a small chattel at an exorbitant figure, and in this way the lender endeavors to get the extra return on his money over the legal rate. In all such cases the law looks to the intent, and if it seems to be usurious it will thwart its object.

Where a note executed in one State is made payable in another under the laws of which it is not usurious while it is usurious under the laws of the State where made, the law of the State of performance will govern as to usury. *142 U. S. 101.*

States and Territories.	Legal Rate.	Highest Rate Allowed.	Penalty for Usury.
Alabama	8 %	8 %	Forfeiture of all interest.
Arizona	7 %	any %	None.
Arkansas	6 %	10 %	Forfeiture of principal and interest.
California	7 %	any %	None.
Colorado	8 %	any %	None.
Connecticut	6 %	6 %	None.
Delaware	6 %	6 %	Forfeiture of double amount of loan.
Dist. of Columbia	6 %	10 %	Forfeiture of all interest.
Florida	8 %	10 %	Forfeiture of all interest.
Georgia	7 %	8 %	Forfeiture of all interest.
Idaho	7 %	12 %	Forfeiture of three times the excess of interest over 18%.
Illinois	5 %	7 %	Forfeiture of all interest.
Indiana	6 %	8 %	Forfeiture of excess of interest over 6%.
Iowa	6 %	8 %	Forfeiture of all interest and costs.
Kansas	6 %	10 %	Forfeiture of double the usury.
Kentucky	6 %	6 %	Forfeiture of excess of interest.
Louisiana	5 %	8 %	Forfeiture of all interest.
Maine	6 %	any %	None.
Maryland	6 %	6 %	Forfeiture of excess of interest.
Massachusetts	6 %	any %	None.
Michigan	5 %	7 %	Forfeiture of all interest.
Minnesota	6 %	10 %	Forfeiture of contract.
Mississippi	6 %	10 %	Forfeiture of all interest.
Missouri	6 %	8 %	Forfeiture of all interest.
Montana	8 %	any %	None.
Nebraska	7 %	10 %	Forfeiture of all interest and costs.
Nevada	7 %	any %	None.
New Hampshire	6 %	6 %	Forfeiture of three times the excess of interest.
New Jersey	6 %	6 %	Forfeiture of all interest and costs.
New Mexico	6 %	12 %	None.
New York	6 %	6 %	Forfeiture of principal and interest.
North Carolina	6 %	6 %	Forfeiture of double the amount of interest.
North Dakota	7 %	12 %	Forfeiture of interest.
Ohio	6 %	8 %	Forfeiture of excess of interest over 8%.
Oregon	6 %	10 %	Forfeiture of interest, principal and costs.
Pennsylvania	6 %	6 %	Forfeiture of excess of interest.
Rhode Island	6 %	any %	None.
South Carolina	7 %	8 %	Forfeiture of double the excess.
South Dakota	7 %	12 %	Forfeiture of all interest.
Tennessee	6 %	6 %	Forfeiture of excess of interest.
Texas	6 %	10 %	Forfeiture of all interest.
Utah	8 %	any %	None.
Vermont	6 %	*7 %	Forfeiture of excess of interest.
Virginia	6 %	6 %	Forfeiture of excess of interest over 8%.
Washington	6 %	12 %	Forfeiture of double illegal interest.
West Virginia	6 %	6 %	Forfeiture of excess of interest.
Wisconsin	6 %	10 %	Forfeiture of all the interest.
Wyoming	8 %	12 %	Forfeiture of interest and costs.

*Allowed on railroad bonds only.

279. Not Usurious, etc.—It is not deemed usurious for the interest to be taken in advance, neither is it to purchase a third person's note

at a great reduction from its face. This is deemed to be a chattel of uncertain value. The agreement to take unlawful interest must be absolute and unconditional. If the agreement is that in case the project for which the money is loaned shall fail, nothing is to be paid, but if the project is successful, a high rate is to be returned, such interest is not usurious. If the money is loaned at a risk, and the interest is to be paid out of the profits or not at all, it is not usury.

280. Expenses of Securing Loan.—When the borrower pays a broker a fee for finding him a lender, this fee does not make the contract usurious. But if the money really belongs to the broker, and it is not a charge for his time and expenses, he will be liable for usury.

281. Effect.—Independent of any statutory provision, money paid voluntarily on a usurious contract cannot be recovered. But many States have provided differently.

PRACTICAL REVIEW.

I. On July A gave B his note at 60 days, for $100, but no mention is made of any interest. If the note is paid at maturity what amount can B demand?

II. In the above case, if the note is not paid until October 1 following, what amount can B claim in your State?

III. A being pressed for funds, borrowed $500 from B and agreed to pay him 2 per cent a month interest. If the note be for six months, how much can he collect in your State at maturity?

IV. A, of Denver, borrows of B, of Chicago, $1,000, on a note for ninety days, payable at the First National Bank of Chicago. The note bears interest at 12 per cent per annum. Is this usury, and if so, how much can be collected?

REVIEW QUESTIONS.

1. Define interest. 2. Define "legal rate." 3. What is meant by the "maximum rate?" 4. What law governs as to the rate? 5. On what is interest allowed by implication? 6. What is annual interest? 7. What is compound interest? 8. What is usury? 9. By what rule of interest are partial payments usually reckoned?

THE SALE OF PERSONAL PROPERTY.

CHAPTER XXVI.

282. Introduction.—A sale of personal property is of course a contract, and is subject to all the rules of law governing contracts. It must have the four essential elements of all contracts, besides which the Statute of Frauds provides that sales above a certain amount must be in writing. (Sec. 105.)

283. Definition.—A sale of personal property is a present transfer by mutual agreement of the absolute or general title to certain personal property for a certain price. It transfers the absolute title as distinguished from that limited title given in case of loan or hire.

284. Parties.—The parties to a sale are the seller and buyer, or as they are usually designated, vendor and vendee respectively. As a rule, those who are competent to contract generally are competent parties to a sale.

285. Assent to Contract and Price.—The parties must agree not only the one to sell and the other to buy, but they must agree upon a price. The price must be fixed, or easily ascertainable by reference to the contract. If the contract does not furnish at least the true criterion of price, and something yet remains to be done between buyer and seller to ascertain it, there is no sale. This rule does not prevent the fixing of the price by implication. Where one goes into a store, points out an article and says he will take it, and possession is given immediately, it is a sale, for the law implies the buyer's promise to pay a reasonable price for it. The adequacy of the price is not necessary to the perfection of the sale, provided every part of the agreement is entered into in good faith, and there is an entire absence of fraud in the transaction. The law does not undertake to make contracts for parties, but leaves them to affix their own prices to goods sold. The price may be left to a third person, and in that

case it is sufficiently certain, for there remains no agreement to be made on the part of the parties.

286. Subject Matter.—This is the property bought or sold. The property must have an actual existence, or at least be capable of existing. That which is not in existence when the title passes cannot be sold, though it has previously existed or may come into existence thereafter. A complete sale stops not short of full execution, of delivery and acceptance. The subject matter need not, however, actually be in the possession of the seller.

287. That Which Has Ceased to Exist.—If the thing existed at one time, but at the time of agreement it has ceased to exist, the sale is void, for there is nothing for the transfer of title to operate upon. This would be so with the sale of goods in a warehouse, which prove to have already been burnt up. Or an animal which, unknown to either party, was dead at the time of sale. When the thing is only partially destroyed, the better opinion seems to be that the buyer has an option whether he will take what remains, making due allowance for the part destroyed, or rescind the entire contract. The same rule holds true when there has been a failure of title as to part. If there be a failure of part, either through loss or defect of title, so that the remainder is unfit for the use intended, or that which remains was not within the inducement to the purchase, the buyer may rescind, and recover any money he may have paid.

288. Subject Matter Not Yet in Existence.—Formerly that which was not in existence at the time of transfer could not be subject matter of a valid sale. But the law has been gradually enlarging the scope of what may be legal subject matter of sale, and now a potential interest may be sold, but a mere possibility, coupled with no interest whatever, is not sufficient. Prospective interests, as profits of a voyage, future earnings on an *existing* contract, the year's clip of wool from a flock of sheep one now owns, are suitable subjects of sale. Thus the milk from a farmer's cows for a certain season, or next season's crop from his farm, or the future offspring of an animal now owned by the seller, are suitable subjects for sale. Each of these contemplates in effect the sale of the product of something which the seller already owns.

289. What Is Not Sufficient.—On the other hand the profits, income or increase of that which is not yet the seller's property, cannot be sold by him, even though he may contemplate purchasing it.

Of this nature are the crops of another's farm, the milk of his cows, or the wool of his sheep. It has been decided that there can be no sale of future wages outside of an actual control of service in force at the time of sale. Neither can there be a sale by a professional man of all prospective fees to be made by him during a certain future period. Here the expectation is not founded upon a right in actual existence.

290. Statute of Frauds.—It will be recalled that one section of this famous statute, which we have already considered, has direct reference to the sale of personal property. The effect of it is to add a fifth requisite to those of an ordinary contract. A very few States[1] have not re-enacted this section, and in them sales of personal property are unaffected. The statute requires the contract of sale of "goods, wares and merchandise" for the sum of fifty dollars or more to be in writing and signed by the party to be charged. The memorandum need not be formal, indeed the word memorandum would indicate as much. It may be a writing which consistently imports a sale contract. It may be expressed by letters, or an acknowledgment of invoice, or by a telegram. It is not even necessary that it pass between the parties, but it may be gathered from various sources from the writings of the defendant. It may consist of his written proposal, supplemented by parol proof of the plaintiff's acceptance. (Sec. 105.)

While most of the States have followed the English law, as to the amount of the sale, namely ten pounds (fifty dollars), yet a few have named a different amount above which every valid sale must be in writing.[2]

291. Who Must Sign.—It will be observed that the statute requires the note or memorandum to be signed. It should be signed by both buyer and seller, if both are to be held, but if signed by but one only he can be held. A contract to be binding ought to be mutual in obligations, so that either might sue the other for noncompliance with its provisions, but this seems to be an exception to the general rule. If the memorandum is signed by but one of the parties, he can be held at the option of the other. In Michigan, however, it has been held that both must sign it or neither can be held.

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[1] Alabama, Arizona, Delaware, Illinois, Kansas, Ohio.

[2] Maine, New Jersey, Missouri and Arkansas have fixed upon $30. Florida and Iowa require sales of any amount to be in writing. In New Hampshire it is $33, and in Vermont $40.

292. What the Memorandum Must Contain.—The writing, to comply with the statute, must show with certainty who is buyer and who is seller. That is, it must show which is buyer and which is seller. It should show what the subject matter was, and if the oral contract named a price, it must appear, but if no price was named, a reasonable one can be fixed by parol. The general trend of decisions is to give force and effect to the memorandum, if the contract can be ascertained from it at all. Sometimes it is desirable to frame a more formal instrument, to comply with the statute. This is called a Bill of Sale, and in addition usually contains a written warranty. It is usually acknowledged by a notary, the same as a deed, and if the possession of the property does not pass at once it should be recorded.

A bill of sale, no matter how it is drawn, if taken as collateral security, or if it is agreed that the maker can have the return of the property by complying with certain conditions, is a chattel mortgage and should be recorded as such.

Know All Men by These Presents, *That O. M. Powers, of the City of Chicago, in the County of Cook, and State of Illinois, party of the first part, for and in consideration of the sum of One Hundred and Fifty Dollars, lawful money of the United States of America, to me in hand paid, at or before the ensealing and delivery of these presents, by F. S. Blair, of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and delivered, and, by these presents, does grant, bargain, sell, and deliver, unto the said party of the second part, all the following goods, chattels and property, to-wit:*

One Remington Typewriter, No; 14678.

To Have and to Hold *the said goods, chattels and property unto the said party of the second part, his heirs, executors, administrators, and assigns, to and for his own proper use and behoof, forever.*

And *the said party of the first part does vouch himself to be the true and lawful owner of the said goods, chattels and property, and have in himself full power, good right, and lawful authority, to dispose of the said goods, chattels and property, in manner as aforesaid. And he does, for himself, as well as for his heirs, executors, and administrators, covenant and agree to and with the said party of the second part, to warrant and defend the said goods, chattels and property to the said party of the second part, his executors, administrators, and assigns, against the lawful claims and demands of all and every person and persons whomsoever.*

In Witness Whereof, *I have hereunto set my hand and seal, the 24th day of July, in the year one thousand nine hundred one.*

O. M. POWERS. [SEAL]

Sealed and delivered in the presence of
L. MITCHELL.

BILL OF SALE.

293. A Rule of Evidence.—In most cases the statute begins: "No action shall be brought whereby to charge," etc., or, "No evidence shall be introduced to charge," etc., and the courts have quite generally held that the contract itself is good, but that the statute prevents the introduction of oral testimony to prove it. It would appear at first that this is a distinction without any practical difference, but it will be noticed that the writing need not be made at the time of the oral contract, but it is sufficient if made later. In this case the contract of sale dates from the day of the oral contract, and not from the day of the writing.

An action was brought for the price of twenty bales of cotton, sold by oral contract while the cotton was in the hands of a warehouseman. Fifteen of these bales were afterwards destroyed by fire, after which the buyer wrote the seller, acknowledging the purchase. The loss was the buyer's.

This letter was a compliance with the statute, and the sale dating from the oral contract could now be proven. Had the rule been that the contract was not finished until the writing was signed there could have been no sale, for at that time a large part of the property was not in existence.

294. Conditional Sale.—It is a common practice with installment houses to deliver the article sold and take a contract calling for the payment of the balance of the purchase price and stating that until such payment the title in the property shall remain in the seller. Most States have statutes governing these matters, a common provision of which is that such contracts must be recorded as chattel mortgages if to be valid as to third persons. (See sec. 293.)

CHAPTER XXVII.

DELIVERY.

295. Delivery.—This is a duty imposed on the seller. It may be either an actual delivery, that is the giving of the actual possession to the buyer, or it may be a constructive delivery. The common acceptation of the term is the manual transfer of the thing sold, but legally it more frequently means the transfer of property or title in the thing sold. It is a transfer of right, whereby at a certain point in the transaction the property and risk of ownership shift from seller to buyer. It is important to determine just when this kind of delivery takes place, for on its determination depends the rights and responsibilities of ownership.

296. Transfer of Specific Chattels.—Specific chattels are those which are in existence, ascertained and appropriated to the contract, so that the sale is plainly a sale of those identical things and no others. Something may yet remain to be done to them, still those identical things are sold. Of this class is a sale of a particular boat, or of a certain herd of cattle, or of all cattle in a certain herd bearing a certain brand, or of all sacks of wheat in a certain car, that bear a certain mark, or of a case of fruit on which is placed the buyer's name, though it is not separated from the remainder. So there may be a sale of a specific portion of goods in a warehouse, if that portion is marked so that it can be distinguished from the mass, even though there be no separation or actual delivery. This rule enables the seller, in case of loss, to prove and the buyer to ascertain to a certainty, whether his particular goods have been destroyed or not. If nothing remains to be done by the parties, and the goods remain in the possession of the seller, he holds them as bailee and not as owner. It seems to be settled that the property does not rest in the purchaser when nothing was said concerning payment, and no arrangement for credit was made, until the price is actually paid or adjusted; immediately upon such payment or arrangement for time,

the ownership immediately shifts to the buyer. Of course a different intention, or a different custom, would govern in a case of this kind.

297. When Something Remains to Be Done.—The goods may be chosen or set aside, or what is the same in effect, marked, yet there may still remain something for the seller to do to them. It may be they are to be weighed, or measured, or it may be the duty of the seller to deliver them at the buyer's home or place of business. The query arises in these cases, when does the risk of ownership shift, at the time of the purchase of the goods, or when weighed, measured or delivered, as the case may be. A person enters a store and makes a selection of certain goods, for which he pays, but which are to be delivered at the purchaser's home. Before delivery the store, including the goods bought, is destroyed by fire. On whom is the burden of loss?

298. English Rule.—Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, counting or testing the goods, the performance of that act is a condition precedent to the transfer of title. This is so even though the identical goods be ascertained. Again, if, by the agreement, there yet remains something to be done by the seller, such as to deliver the goods at a certain place, the title is not presumed to pass until the delivery has been made.

A sells to B ten bolts of cloth at 40 cents per yard. The cloth was set aside and was to be measured the following day, when B was to pay the price. A's goods, including this cloth, were attached by a creditor immediately after the contract. B cannot get the cloth, for its ownership was in A at the time of attachment.

299. American Rule.—While it must be admitted that there are many American decisions to the contrary, yet the weight of authority is certainly in favor of the English rule. The courts rely a great deal upon the intention of the parties in each particular case, and this has tended to create some confusion.

300. The Test, then, as laid down by Chancellor Kent, seems to be, "if anything remains to be done as between the seller and the buyer, before the goods are to be delivered, a present right of property does not attach in the buyer," and any loss is upon the seller.

301. Delivery without Change of Possession.—It could easily be inferred from what has been said that an actual delivery of goods is not necessary in order to pass the title to the buyer. If the goods

are set aside, or can be accurately identified, and await the call of the buyer, they are constructively delivered, and the seller holds them as bailee. In the absence of any agreement or custom to the contrary, the law presumes a delivery to be made where the chattels were when the bargain was completed. It is in such case not binding on the seller to search for the buyer. He has done his duty when he stands ready to deliver on the call of the buyer.

B purchased from A fifteen sheep, which were marked and paid for. B was to call for them on the following day. They were B's sheep, and A holds them as a bailee and not as owner. Should they be killed through no fault of A's the loss would be upon B. Here is a change of ownership without change of possession.

302. Delivery by Installments.—If the contract be silent as to the quantity of goods to be delivered at each of the certain fixed periods, but names a gross amount to be delivered within the full period, the quantity to be delivered at each period is left to the option of the seller.

303. Delivery to Carrier.—When goods are ordered as from a wholesale merchant in a distant place, he makes a proper delivery by delivering them to the carrier in good condition, properly packed and marked. Should a loss occur thereafter it will be upon the buyer. The seller, however, should follow the buyer's instructions as to the route. If no instructions are given as to the line of shipment, the seller should use reasonable care in selecting a suitable one.

304. A Sale That Defrauds Third Persons.—Sometimes a sale is made, and by its terms the seller is to retain possession of the thing sold. This is valid so far as the parties themselves are concerned, but as to third persons it may not be. This is the course often pursued by persons in their attempt to defraud others. Being in the possession and owners of certain chattels, they will make a secret sale to a friend, but still retain the possession of the goods. Others seeing them still in possession of the goods, are induced thereby to extend to them a larger credit, but in attempting to enforce their claims are informed that the goods were long since sold to another. This is certainly a fraud on such creditors, and in their behalf the law will set the sale aside. (See sec. 82.)

305. Constructive Delivery.—It frequently happens in a sale that the thing sold is too ponderous to be easily transferred by a manual delivery. In such cases a constructive delivery is sufficient. Bulky

goods in a warehouse may be delivered by a delivery of the key to the warehouse. The property to logs may be transferred by taking the buyer where they are and giving him access to them, and so grain in an elevator may be transferred by delivery of a warehouse receipt.

306. Stoppage in Transit.—This is a right possessed by one who has sold personal property on credit to intercept them while in transit, to save himself from loss occasioned by the insolvency of the buyer. When goods are ordered to be shipped, they are delivered when in the custody of the carrier, who is considered the agent of the buyer and not of the seller. But the seller still retains the right of stoppage in transit. In order that this right may exist, the goods must still be in the hands of the carrier, and not delivered; the buyer must owe for these identical goods, and the buyer must be insolvent.

307. In Transit.—If the goods have been delivered into the actual possession of the buyer, the right is lost. It may also be lost, as we have previously remarked (sec. 236), by a sale of the goods by the buyer and a delivery of them by the transfer of the bill of lading.

308. The Debt.—Goods cannot be stopped for a general balance due, but the debt must be for the identical goods. They may be stopped for a portion of their cost, and so may they also, if a note has been given for them, for the note may be returned when the original account will stand. All the seller can claim is the debt, hence if this be tendered him by the buyer, he must release the goods.

309. The Insolvency.—If the seller knew of the buyer's insolvency at the time of the sale, his right of stoppage is lost. It is not necessary for the seller to await a formal adjudication of brankruptcy, for the very lapse of time would defeat the object of the remedy. In case of uncertainty, his interests demand that he act promptly.

310. Method of Exercising Right.—No particular method is prescribed by law. The only thing necessary where the right exists is for the seller, by any declaration or act plain enough for the carrier to understand, to countermand delivery to the buyer. The usual method is to notify the carrier, forbidding delivery and requiring the goods to be held for further instructions. The carrier is bound to obey, for the proper exercise of the right is at the seller's peril and not his.

A FORM OF NOTICE.

Aurora, Ill. July 18, 1901.

To the Adams Express Co., City.

Gentlemen: On the 16th instant I delivered to you three bicycles, marked and consigned to Charles Farr, Galveston, Texas. I have just learned of circumstances that give me the right of stoppage in transit. Please do not deliver these goods, but hold them for further orders. *Daniel E. Zook.*

311. Effect.—The effect of exercising the right of stoppage is not to rescind the sale, but to put the seller in possession with the rights of an unpaid seller of goods sold for cash on delivery. The seller may re-sell the goods upon notice, on the buyer's account, and for any deficit he can proceed against the buyer and in like manner he must account to the buyer for any surplus. The right of stoppage is paramount to that of attaching creditors. So if the buyer's creditors attach, the seller may still exercise his right before delivery, and the attachment yields to his claim.

CHAPTER XXVIII.

SALE OF PERSONAL PROPERTY—CONTINUED.

312. A Distinction should be drawn between an absolute or completed sale and an agreement to sell. The former is an executed while the latter is an executory contract. If anything remains to be done or ascertained by the parties it is an agreement to sell and not a completed sale. In a completed sale the property in the thing sold passes to the purchaser. In an agreement to sell it remains with the seller. The property in the thing sold may pass to the purchaser, though the possession may remain in the seller.

313. Sales on Trial.—We have already discussed in a general way conditional sales, and have seen that the title does not pass until all conditions are complied with. The condition is a condition precedent to the passing of the title. Goods are often sold to await the call of the buyer for delivery. Of this class also are sales of goods "on trial," or "on approval." The object of this is to give the

buyer an opportunity to test the qualities of the thing and find it satisfactory before he shall be bound. There is a manifest difference between a "sale on trial" and a sale "with privilege of returning." In one case the property does not pass until approval, and in the other it passes at once, subject to the right to rescind. In sales on trial the buyer has an option for any period agreed upon, but if no time was fixed then he has a reasonable time in which to decide. The duty rests on the buyer to make known his disapproval, and if he remain silent beyond the stated time, or beyond a reasonable time, the property is his, and the sale becomes absolute. If the article is unsatisfactory he need not give the seller the opportunity of remedying any defects. He must take good care of the article while in his possession for trial, for it is not his property. He is in a great measure the sole judge as to whether he wishes to retain it or not.

314. Sale of Goods to Arrive.—Goods expected to arrive from abroad are often sold as "to arrive." The effect of this is to make their arriving a condition precedent to the completed sale. Goods which a person may own on an incoming vessel may be sold, and their delivery be effected by a transfer of the bill of lading, in which case it is an absolute and not a conditional sale. When goods are sold "to arrive," the conditions precedent to a sale are (1) that the ship named arrive, and (2) that on arrival these goods prove to be aboard. Unless the goods do arrive neither party is bound.

315. Sale by Sample.—This is also a conditional sale. There is a condition that the buyer has the right of comparing the bulk with the sample, and a condition that the thing delivered shall in every way answer the description of the sample. If the thing offered is not in every respect up to the sample or description, the buyer may repudiate the whole contract.

316. Form of Chattel Mortgage.—A chattel mortgage, from its form, would appear to be a kind of conditional sale, but it is in reality but a security for a debt. A note is usually given, and the mortgage is executed to secure that note. By referring to the form given in connection herewith, it will be seen that it begins by an absolute bill of sale of the goods, with a covenant of warranty. The goods must be accurately and minutely described, so that they may be identified. Then follows a proviso or condition that if the note or debt (describing it) shall be paid, then the sale to be void.

Know All Men by These Presents, *That G. W. Brown, of the Town of Peoria, in the County of Peoria, and State of Illinois, in consideration of the sum of Five Hundred Dollars, to him paid by J. L. Talbot, of the County of Porter, and State of Indiana, the receipt whereof is hereby acknowledged, does hereby grant, sell, convey and confirm unto the said J. L. Talbot, and to his heirs and assigns, the following goods and chattels, to-wit: His bay mare "Nellie;" his bay horse "Jerry," and his surrey, including both tongue and shafts.*

To Have and to Hold *All and singular the said goods and chattels, unto the said Mortgagee herein, and his heirs, executors, administrators and assigns, to him and their sole use, forever. And the Mortgagor herein, for himself and for his heirs, executors and administrators, does hereby covenant to and with the said Mortgagee, his heirs, executors, administrators and assigns, that said Mortgagor is lawfully possessed of the said goods and chattels, as of his own property; that the same are free from all incumbrances, and that he will, and his executors and administrators shall, warrant and defend the same to him, the said mortgagee, his heirs, executors, administrators and assigns, against the lawful claims and demands of all persons.*

Provided, Nevertheless. *That if the said Mortgagor, his executors or administrators, shall well and truly pay unto said Mortgagee, his executors, administrators or assigns, a certain promissory note of even date herewith made payable by the said Mortgagor to the order of the said Mortgagee for the principal sum of Five Hundred Dollars, due six months from date, with interest at six per cent per annum from date, then this Mortgage is to be void, otherwise to remain in full force and effect.*

And, Provided, Also. *That it shall be lawful for the said Mortgagor, his executors, administrators and assigns, to retain possession of the said goods, and chattels, and at his own expense, to keep and use the same, until he or his executors, administrators or assigns, shall make default in the payment of the said sum of money above specified, either in principal or interest, at the time or times, and in the manner hereinbefore stated. And the said Mortgagor hereby covenants and agrees, that in case default shall be made in the payment of the note aforesaid, or of any part thereof, or the interest thereon, on the day or days respectively on which the same shall become due and payable; or if the Mortgagee, his executors, administrators or assigns, shall feel himself insecure or unsafe, or shall fear diminution, removal or waste of said property; or if the Mortgagor shall sell or assign, or attempt to sell or assign, the said goods and chattels, or any interest therein, or if any writ, or any distress warrant, shall be levied on said goods and chattels, or any part thereof; then, and in any or either of the aforesaid cases, all of said note and sum of money, both principal and interest, shall at the option of the said Mortgagee, his executors, administrators or assigns, without notice of said option to any one, become at once due and payable, and the said Mortgagee, his executors, administrators or assigns, or any of them, shall thereupon have the right to take immediate possession of said property, and for that purpose may pursue the same wherever it may be found, and may enter any of the premises of the Mortgagor, with or without force or process of law, wherever the said goods and chattels may be, or be supposed to be, and search for the same, and if*

found, to take possession of, and remove, and sell, and dispose of the said property, or any part thereof at public auction, to the highest bidder, after giving ten days' notice of the time, place and terms of sale, together with a description of the property to be sold, by notices posted up in three public places in the vicinity of such sale, or at private sale, with or without notice, for cash or on credit, as the said Mortgagee, his heirs, executors, administrators or assigns, agents or attorneys, or any of them, may elect; and out of the money arising from such sale, to retain all costs and charges for pursuing, searching for, taking, removing, keeping, storing, advertising, and selling such goods and chattels, and all prior liens thereon, together with the amount due and unpaid upon said note, rendering the surplus, if any remain, unto said Mortgagor, or his legal representatives.

Witness *the hand and seal of the said Mortgagor, this 27th day of July, in the year of our Lord one thousand nine hundred one.*

G. W. BROWN. [SEAL]

CHATTEL MORTGAGE.

317. Execution and Registry.—So far as the parties themselves are concerned, a chattel mortgage may be either oral or in writing, and it is only to prevent fraud upon third persons that the statutes have quite generally regulated the matter. A party in possession of personal property is, in the absence of evidence to the contrary, presumed to be the owner. For this reason as great a publicity as possible is given to the fact that though the goods remain in the possession of the mortgagor, yet they are mortgaged. Most statutes require that the mortgage must be acknowledged before some officer, usually a justice of the peace or town clerk of the town where the property is situated or where the mortgagor lives. A record of the mortgage is there kept convenient to all who may wish to consult it. In addition, the mortgage is recorded in the county records. It thus becomes notice to the world what the mortgagor's right is, and all persons are presumed to take notice of it.

318. Mortgagee's Rights.—The mortgagee's rights depend largely upon the statutes of the State, and also upon the conditions and covenants of the instrument itself. He often has the right by contract to enter at any time upon the premises and take possession of the goods if he deems his security in peril. After default he may take possession of them and expose them to public sale, after advertising them according to law. He usually cannot sell them at private sale unless by contract. He may also foreclose the mortgage by a suit in equity.

In many States a chattel mortgage can be given only for a certain

length of time, and beyond that it is null and void. Consequently, if the mortgagee would avail himself of the advantage of his mortgage, he must do so during its life, or if he does not he may find himself postponed to other creditors.

319. Presumption.—When a sale is made the parties do not always definitely agree upon all the details of the contract. In this case it remains for the law to supply by inference what they have omitted. As we have previously remarked, they do not always agree on the price, but the law presumes that a reasonable price was intended. In like manner, nothing being said about the manner of payment, it is presumed that cash was intended. All these presumptions may, however, be overcome by the circumstances of the case, and the previous dealings of the parties.

320. Warranty.—A warranty is an express or implied statement of something which a party undertakes shall be a part of a contract. It is usually an undertaking on the part of the seller that the thing sold is as represented. A representation is not always a warranty. Only the representations that are made in such a way as to become a part of the contract, and one of its inducements, are warranties. A mere matter of opinion, stated as such, will not amount to a warranty.

A enters B's store to buy a case of blackberries. B shows him the berries and remarks that they are the finest that have been or will be on the market this season. This is a representation but not a warranty.

321. Caveat Emptor.—It is an old rule of law that the buyer of personal property takes it at his own risk. *Caveat Emptor*, "let the buyer beware." This rule applies, as we shall see, more especially to the quality of the subject matter, and throws all risk in this respect on the buyer. The seller may have given an express warranty of quality, but, as a rule, it is not presumed.

322. Time When the Warranty Was Made.—The time when a statement is made has much to do in determining whether it amounts to a warranty or not. An offer to warrant, made at the time of making the proposition, was held good when the proposition was accepted, some days later, upon the faith of the warrant. The intention and circumstances largely govern such cases, but in general, statements to be binding as warranties, should be contemporaneous with the sale. If made after the sale has been completed, the warranty is void for want of consideration.

A bought a bicycle from B, a dealer. After the price had been paid, and when A was leaving, he asked if there was a warrant on the machine, and was told by B that he would warrant it for a year. This is of no value for lack of consideration.

323. Kinds.—Warranties are either expressed or implied, and in reference to the thing warranted, are either of title or of quality.

KINDS.
- 1. As to Expression.
  - *a.* Express.
  - *b.* Implied.
- 2. As to Subject matter.
  - *a.* Of Title.
  - *b.* Of Quality.

324. Warranty of Quality.—Whether a statement made at the time of sale will amount to an express warranty or not depends, as we have said, upon the circumstances of each case. If there was a serious defect covered by the seller's statement, and one peculiarly within his knowledge, and not open to the buyer's inspection, it will have great weight in deciding his statement to be a warranty. But it must be remembered that *Caveat Emptor* is the general rule and that these are only exceptions or modification of it.

325. When Warranty of Quality Is Implied.—When the buyer is not permitted to inspect the goods, or where inspection from the nature of the case is impossible, the rule of *Caveat Emptor* does not apply, and a warranty is implied. This is the case when goods are sold by sample or description. When goods are ordered for a particular purpose, and the buyer must necessarily rely on the judgment and expert knowledge of the seller, a warranty is implied that such knowledge will be used.

326. When Warranty of Title Is Implied.—On this question the courts make a distinction between goods in the possession of the seller at the time of sale, and those not in his possession. As to the former, a warranty of title is implied, but not as to the latter. If the seller be an officer of the law, or a trustee, no warranty of title is implied, consequently he who buys at such a sale merely buys what right or interest the seller may have had.

327. Lost Property.—The finder of lost property has a valid title thereto against every one, except the true owner. One who purchases such property from the finder, for value, acquires no title against the real owner, who can recover it at any time. The buyer, in such case, has no recourse but the implied warranty of title by possession on which to rely.

PRACTICAL REVIEW.

I. A buys of B all the lumber of a certain quality in a certain pile and is given possession of it all to select his portion. Before he makes the selection the pile is seized by a creditor of B. What rights has A?

II. A sells to B 100 barrels of salt lying in a warehouse and endorses the warehouse receipt to B. If A's creditors should attach the salt what would be B's rights?

III. A ordered a wagon of B. A examined it while it was being painted and was pleased with it. The shop and wagon were burned. Who must bear the loss?

IV. A gave a bill of sale of his furniture to B, who did not remove it. It was afterwards attached by A's creditors when B claimed it. What are B's rights?

V. A orders goods of B by sample. When the goods arrive he opens them, but finds them not up to sample. What should A do to prevent liability?

VI. A sells his piano to B and gives a bill of sale but the piano is not removed. Afterwards A sells it to C who removes it, when B claims it and produces his bill of sale. Who is entitled to it and why?

VII. A orally agrees to sell to B a certain bin of wheat holding about 500 bushels at 90 cents per bushel. The next day C offers him $1 per bushel for half of it. He accepts C's offer and delivers the wheat to C. What are B's rights?

VIII. A sells to B 500 bushels of corn at 40 cents per bushel to be delivered at a certain future time. One hundred dollars were paid down by B as earnest money. A delivers 300 bushels according to contract, but refuses to deliver more. What are B's rights?

IX. A ships goods at Chicago to B of Baltimore. The next morning B's failure is announced in the papers. If the sale be on credit, what can A do?

X. A sells a number of hats to B. The hats are in the next room and A offers to show them, but B says it is unnecessary. When they are delivered he finds that they are not of the quality he supposed. What, if anything, can B do about it?

XI. A agrees to sell B 6,000 bushels of corn at 35 cents per bushel and was to have six weeks in which to deliver it. He delivered 3,000 bushels in two weeks when he refused to deliver any more. What are the rights of each party?

XII. In the above case suppose the seventh week A tenders the remaining 3,000 bushels, must B receive it?

XIII. A, a drover, bought a carload of cattle from a farmer who was to deliver them to the railroad company on a certain day for transportation. The day the farmer was to deliver the stock he was otherwise engaged and did not make the delivery until three days afterwards. Between the time when he should have made the delivery according to agreement and the day when he did make it, two of the cattle died. On whom will the loss fall?

REVIEW QUESTIONS.

1. Define a sale of personal property. 2. Designate the parties to a sale. 3. What are the essentials of a sale? 4. What may be subject matter of a sale? 5. Can property not now in existence be the subject of sale? 6. Name something which cannot be sold. 7. How does the Statute of Frauds affect a sale in your State? 8. What must be done to comply with the statute? 9. Must the memorandum be formal? 10. Who must sign it? 11. How does

the rule in this regard differ from the ordinary rule of contracts? 12. What must the memorandum contain? 13. What is a bill of sale? 14. Is it acknowledged? 15. Is the Statute of Frauds a rule of evidence or does it relate to the validity of the contract? 16. Why is this a material question? 17. What is delivery? 18. Why is the question of the exact time of delivery important? 19. Can one sell and deliver goods and still retain their possession? 20. Give an illustration. 21. In what capacity does one hold goods that he has sold? 22. When one buys goods that are to be delivered by the seller, whose loss is it in case of their destruction? 23. What is the English rule on this question? 24. What is the test laid down by Kent? 25. In the absence of agreement or custom where is delivery presumed? 26. In the absence of an agreement when is it presumed that payment is to be made? 27. How can one deliver without a change of possession? 28. What is the rule for delivery by installments? 29. Whose agent is a carrier, the buyer's or the seller's? 30. How is a sale without change of possession often a fraud on third persons? 31. What is constructive delivery? 32. What is meant by stoppage in transitu? 33. How and when may it be exercised? 34. What is its effect? 35. How does a sale "on trial" differ from a sale with privilege of returning? 36. What is a chattel mortgage? 37. How are they usually executed? 38. What is a warranty? 39. What is meant by "Caveat Emptor"? 40. When will a statement be construed as a warranty? 41. When will a warranty of title be implied? 42. When will a warranty of quality be implied? 43. Who is entitled to lost property?

BAILMENT.

CHAPTER XXIX.

328. Introduction.—Bailment is a very important branch of the law. When we learn that it includes the law in reference to the borrowing, lending, hiring and the keeping of chattels, and the carrying or working upon them for another, we can realize the force of the above statement. The word comes from the Norman-French *bailler*, meaning to deliver. Hence that which is delivered to another for any of the purposes named above, is bailed to him. The law which determines the rights and duties of the parties in relation to the property and to each other, is the law of bailment. The one who delivers the goods is called the bailor, and the one to whom delivery is made is called the bailee.

Bailment is defined as a delivery of goods or money by one person to another in trust for some special purpose upon a contract expressed or implied that the trust shall be faithfully executed.

329. Kinds.—The subject of Bailment is divided on the basis of the thing to be done to the property into five classes, viz: I Deposit; II Commission; III Gratuitous Loans; IV Pledge; V Hire. These will be considered separately.

330. Degrees of Care.—One of the most important questions in reference to bailments, and one which the bailee should answer immediately upon receipt of the chattel, is in regard to the degree of care required of him to save himself harmless in case of its loss or destruction. Courts have established and defined for this purpose three kinds of care, viz.: 1. Slight care, or that degree of care which every man of common sense, though very absent minded and inattentive, applies to his own affairs. 2. Ordinary care, which is that degree of care which every person of common and ordinary prudence takes

of his own concerns. 3. Great or extraordinary care, which is the degree of care that a man remarkably exact and thoughtful gives to his own property. It is apparent that the degree of care required measures inversely the degree of negligence for which the bailee will be responsible. Thus, if slight care is required, he will only be liable for gross negligence. If ordinary care is required, he will be liable for ordinary negligence, and if great care is required he will be liable for slight negligence.

331. General Rule as to Care.—It will be noticed that some bailments are, from their nature, solely for the benefit of the bailor. In like manner some exist solely for the benefit of the bailee, while in other cases they are for the benefit of both. If the bailment is for the benefit of the bailee, he must take great care, and is liable for slight negligence. If it is for the benefit of the bailor, the bailee must take slight care, and is liable for gross negligence. And if for the benefit of both parties, then ordinary care is required, and the bailee is liable for ordinary negligence.

KIND OF BAILMENT.	FOR BENEFIT OF	CARE REQUIRED.	FOR WHAT NEGLIGENCE LIABLE.
Deposit.	Bailor.	Slight.	Gross.
Commission.	"	"	"
Loan for Use.	Bailee.	Great.	Slight.
Pledge.	Both.	Ordinary.	Ordinary.
Hire.	"	"	"

DEPOSIT.

332. Definition.—Deposit is a delivery of goods and chattels to another, to be kept and returned without recompense. A distinction should be drawn between the ordinary case of deposit in a bank, subject to check, and deposit as here defined. That is not a bailment, but a case of debit and credit. It is not expected that the identical money will be returned. Here the same property must be returned.

333. Liability.—As the keeping is gratuitous, it is solely for the benefit of the bailor, and the bailee is liable only for gross negligence. The question of what is gross negligence, it will be readily seen, must depend upon a variety of circumstances, such as the nature and quality of the goods, and the character and custom of the place. What would be ordinary care in case of one class of goods, would be gross negligence in case of another.

A being about to start on a journey, and intending to be abroad some time, puts his valuables, including his household plate, in the hands of B for safe keeping. This is a case of deposit, and B, if he would avoid liability, must take at least slight care. But slight care in case of articles of this kind may be better than great care in case of something less valuable.

334. Duty of Bailee.—The bailee is bound to deliver the thing as it was, and with all its increase or profit. But it is sufficient if he delivers or tenders it at his own residence or place of business. No one is obliged to become a bailee against his will, hence if he find a chattel he does not have to take possession of it, but if he does take possession of it, he is liable to the owner as a bailee for deposit.

A, for reasons of his own, desired B to see a valuable picture owned by C. He borrowed the picture of C and sent it by a son of B's, who placed it on a mantel in his father's house. The picture was there much injured by the fire. C brought an action against B for the damage to the picture, but it was decided that B could not be made a bailee without his consent.

335. Use of the Deposit.—As a rule the bailee is not permitted to use the deposit. An understanding, however, that he is to use it may exist between the parties. Thus there are cases when the moderate use of the deposit would be for its advantage.

336. Right of Bailor.—The bailor may demand the return of his property at any time, but he cannot maintain an action against the bailee until he makes a demand for its return, and it has been refused.

337. Rights of Bailee.—While it is true that deposit is a gratuitous bailment, yet the bailee is entitled to be repaid for any legitimate expense to which he may have been put for the preservation of the deposit. He is not, however, entitled to any compensation for his own services. The bailee may terminate the bailment at any time by giving the bailor notice, and a reasonable time in which to remove the deposit.

COMMISSION.

338. Definition.—Commission is that class of bailment in which the bailee undertakes gratuitously to do something for the bailor in reference to the thing bailed. In deposit the principal thing was the keeping, but in commission it is the work to be done. A clear distinction should be drawn between this class of bailment and the ordinary sale of goods on commission. This is gratuitous while that is undertaken for a consideration.

A owed a note due at a bank in a distant city. B, going there, was given by A an important letter to deliver, and the money to pay the note, but he neglected both to deliver the letter and to pay the note. He was held liable for his failure to complete the service. This is a case of commission.

339. Compensation.—It will be noticed that commission is a gratuitous undertaking, and it may be suggested to some that for this reason such a contract cannot be enforced. But it is held that if the bailee accepts the property and the trust, and enters upon the execution of his agency, he is liable for malfeasance. It is true that he may derive no advantage whatever from the bailment, but it is sufficient if the bailor may suffer damage in consequence of the bailee's failure to complete the trust. The consideration is the delivery of the goods by the bailor.

340. Liability of Bailee.—Commission being a bailment for the benefit of the bailor, the bailee is required to take slight care, and is only liable for gross negligence. If the bailee does not enter upon his trust he is not liable for his failure, but if he attempt to perform a service for another, even though it be gratuitous, he will be liable unless he has used proper care and skill.

A and B were farmers. B learning that A was going to town the following day, gave him a sum of money with which to buy a watch. During the night thieves broke in and stole from A both his own money and also B's. Would A be liable for B's loss? What determines A's liability?

341. When Skill Is Required.—The degree of skill a bailee is required to bring to bear in the execution of a trust of this nature, depends upon the circumstances of the case and the intention of the parties. It depends somewhat upon his occupation or profession, and the nature of the services to be performed. Should a professional trainer offer to train gratuitously a horse for a coming race, he would be held to a greater degree of skill than would a non-professional.

342. Bailee's Interest.—As in deposit, while the bailee is to perform services without consideration, yet if he has been to any necessary expense for the preservation of the things bailed, or for the accomplishment of the object of the trust, he is entitled to reimbursement, and has a lien upon the property until paid.

343. Bailee's Duties.—It is the duty of the bailee to return the thing itself to the bailor, together with all the increase or profits thereof. In the case of animals, their young must be returned with them. It is also the duty of the bailee to render an account of his execution of the trust when called upon by the bailor to do so.

CHAPTER XXX.

GRATUITOUS LOANS.

344. Definition.—This is a delivery of goods to another, to be used by him without recompense to the lender. It includes all cases of borrowing the goods of another without compensation. The benefit is all on the side of the borrower or bailee.

345. Compensation.—This class of bailment must be gratuitous, for if there be a compensation for the use of the thing it is then a bailment for hire, and hence for the benefit of both parties.

346. Diligence Required.—As might be inferred from the general rule already laid down, the borrower is required to use great care, and is liable for the slightest negligence. This rule is rigidly enforced, for it is deemed that the least the borrower can do is to use his utmost endeavor to preserve the thing borrowed. It must not, however, be inferred that he actually insures the safety of the goods.

347. Use of Thing Borrowed.—The borrower is confined strictly to the use for which the thing was loaned whether this use be actually agreed upon or was a matter of implication. So strict is the rule of law in this regard that it has been held that if a horse was loaned to ride to a certain place, the borrower would have no right to ride him elsewhere in another direction, even though it may not be so far and he may travel over a better road. If the borrower does so change his destination, he becomes absolutely liable for the animal's safety. If the thing was loaned for a certain time, he may use it for that time, but has no right to retain it longer.

348. A Personal Use.—A gratuitous loan is considered a strictly personal trust, unless from the circumstances a different intention can be fairly inferred. This being the case, the borrower has no right to relend the thing. Thus, if A lends his horse to B, B will not be justified in relending it to C, for while A might be perfectly

willing to lend his horse to B, in whom he has especial confidence, yet he might not be willing to trust him into the hands of C.

349. Liability of Borrower.—If the borrower is put to any expense in reference to the thing borrowed, he will, as a rule, be obliged to pay it. He is liable for the keep of an animal he may borrow, and for any repairs on a borrowed machine, occasioned by his use of it. He is not liable for inevitable accidents that could not be foreseen or guarded against. But in such cases there must be no trace of fault on his part, for if by his acts or his lack of caution he seems to have courted danger, he will be responsible.

A borrowed a valuable violin from B. Some time after, the violin was stolen from A's house. In a trial for the recovery of the value of the violin it appeared that A left the instrument in his home, that all the doors were securely locked, but that the thief forced open the door and took the violin, together with other goods belonging to A. A was held not liable.

350. Liabilities of Lender.—It has been decided that the lender is liable to the borrower for any mischief arising directly from the unsafe condition of the thing borrowed, if this fact be known to the lender and not communicated to the borrower. The lender must not interfere with the borrower's use and enjoyment of the thing borrowed, during the time for which the loan was made. For this period the borrower has a certain property in the thing borrowed, to the exclusion of the owner.

351. Return of Property.—The borrower should return the property at the end of the period for which the loan was made. He must return all profits and increase of the borrowed property. If he does not make a proper return of the property he is liable even for accidents that may befall it.

PLEDGE.

352. Definition.—This is a delivery of goods by a debtor to his creditor to be kept as a security till a certain debt or obligation be discharged. It is for the benefit of both parties, for while the bailee (pledgee) obtains security for his loan, the bailor (pledgeor) is enabled to obtain credit or other indulgence.

353. What may be Pledged.—As a rule anything may be pledged that can be sold or that may be assigned (sec. 133). This includes almost all kinds of personal property, except as noted. Articles that fall within the statute of exemptions may be pledged.

354. Degree of Care.—This being a bailment for the benefit of both parties the bailee is required to exercise ordinary care and is liable for ordinary negligence.

355. The Debt.—From the definition of pledge it follows that in every case there must exist a debt or an obligation to perform some act for which the pledge be given. The pledge may be held until the debt, interest, and all necessary expenses incidental to its possession have been paid. Only by agreement can the pledge be made to cover obligations not yet incurred. The debt secured may be either absolute or conditional. It may be for the loan of money, or it may be for a conditional obligation, such as to indemnify the pledgee for becoming an indorser or surety for the pledgeor.

356. Delivery in Pledge.—Delivery of the pledged property to the bailee is absolutely essential to the establishment of the relation of pledgeor and pledgee, always having in mind such change of possession as the nature of the thing allows. As we have frequently remarked (sec. 169) advances are frequently made by way of pledge upon the transfer of bills of lading and warehouse receipts. Stocks, bonds, notes, judgments, insurance policies, leases and mortgages may likewise be delivered as pledges by any means, that will put them in the control of the pledgee such as endorsement or power of attorney to endorse.

357. When Pledgee may use Property.—Whether the pledgee has the right to use the pledge or not depends on the nature of the pledge and the circumstances of the case. If a moderate use be essential to the preservation of the pledge, then such use would not only be justifiable but indispensable to a faithful discharge of the trust. But if its use would deteriorate the pledge then he should not use it.

358. Property of Pledgee in the Pledge.—The pledgee has a special property in the pledge by virtue of the bailment, and may sue not only third persons, but the owner himself, for wrongfully interfering with his right of possession. Against third persons his measure of damages is the full value of the pledge, for he must account to the owner for that amount. The pledgee may in turn re-pledge his interest in the property to another.

359. Pledgeor's Right of Transfer.—While it is true the pledgeor has parted with his property for value, yet he has not parted with the

entire property in it, but still retains a right to redeem it by paying the debt for which his property is held. This right he can sell and assign to another, in which case the vendee will stand in the pledgeor's place.

360. Wrongful Pledge.—As the purchaser of personal property acquires no title as against the true owner who has not given his assent to the sale either expressly or by implication, so a pledgee who receives property from one not the true owner, acquires no title as against that owner. It is on this principle that stolen goods are often recovered by the owner from a pawnbroker, where they have been pledged by the thief.

361. Pledge Differs from Mortgage.—It has often been said that a pledge differs from a chattel mortgage in that when property is pledged the title remains still in the pledgeor; but when mortgaged it passes to the mortgagee, subject to a condition. A clearer distinction seems to be that in pledge the possession passes to the pledgee, while in a mortgage the possession usually remains with the mortgagor.

362. Remedies of Pledgee.—The pledgee has no remedies until the pledgeor is in default, after which, and while the debt remains unpaid, he has the following: (1) To sue the pledgeor personally for his debt, without selling the pledge. (2) Electing to take his remedy upon the pledge, he can file a bill equity and obtain a decree of foreclosure. (3) He can give a reasonable notice to the debtor to redeem the pledge, and then at his option sell the pledge.

The sale must be open and public, and the actions of the pledgee free from fraud. The pledgee has no right to retain the pledge in satisfaction of his claim, for until disposed of in one of the regular ways mentioned above, he still holds it as a pledge, and must restore it upon being tendered the amount of the debt, interests and legal charges. It is said that he should not buy the pledge at his own sale, nor should he sell at private sale unless the conditions of the pledge permit it. If the proceeds do not pay his debt, he can sue for the deficit; and if the sale realizes more, he should account for the excess to the pledgeor. If the pledge consists of several chattels, one or more of which will satisfy his claim, he is not authorized to sell the remainder, but should hold them for the use of the owner. *58 So. W. Rep. 1068. 56 So. W. Rep. 1117.*

363. Negotiable Paper an Exception.—It is held by the courts of many States[1] that commercial paper, such as bonds, notes and mortgages, pledged as collateral security, cannot be sold in the absence of a special agreement, but must be held and collected as they become due. Where this is the case, the pledgee should secure the power of sale at the time of taking the pledge.

The business of Pawnbrokers is quite generally regulated by statute. They are often required to report daily to the police department what pledges they have taken for the day.

CHAPTER XXXI.

HIRE.

364. Introduction.—The fifth and last general class of bailment, that of hire, is without doubt the most important because the most comprehensive of all. It is a delivery of personal property to another to be used, or to have some labor or service performed upon it, and for a compensation. It is a case of hiring for a compensation the labor, care, or property of another.

365. Divisions.—The subject may be divided for convenience into four divisions or classes, viz.: (1) hire of things, (2) hire of services, (3) hire of custody, (4) hire of carriage. These will be separately treated.

HIRE OF THINGS.

366. Definition.—Hire of things is a contract whereby the bailee secures the use of the bailor's property for a consideration.

A is a liveryman. B hires from him a team and buggy to drive to a certain place. This is a case of hire of things.

367. Duty of the Letter.—The letter should deliver the thing promptly and as agreed. If it has become broken or injured the hirer may refuse to accept it. It should be in a condition to be used as contemplated. The letter must not in any way interfere with the hirer's use of the thing, and he has no right to resume possession of

[1] *82 Ill. 548. 165 Mass. 402.*

it during the period for which it was let. Neither has he a right to give possession of it under a bill of sale, so that the hirer will be deprived of its use. The owner is bound to keep the thing in proper condition for use, but the hirer of an animal is bound for the expense of its keep.

368. Use of Thing Hired.—The hirer has a right to use the thing only in the manner and for the purpose for which it was hired. Should he use it for a different purpose he would become absolutely liable for any loss that might happen to it. This rule is not now so rigorously enforced as formerly.

A hired a horse for a certain journey, but unexpectedly meeting a friend turned aside to visit him, using all the while prudent care of the animal. The horse was injured by stumbling, and the hirer was held not liable.

Much latitude is now given the hirer in his proper enjoyment of the article, so long as it is used substantially for the purpose, and in the manner for which it was hired. But if pictures are hired for use in a dwelling, this would not authorize placing them on exhibition for hire. The hirer is entitled to the exclusive use of the thing hired but he must use it with care and moderation.

369. Degree of Care.—The hirer must use ordinary care and diligence and is responsible for ordinary negligence. He should restore the thing in as good condition as when received, ordinary wear and tear excepted, unless it has deteriorated through some cause beyond his control. If it be injured through no fault or neglect of his, and while he was making proper use of it, he will not be responsible, for the risk is the owner's.

A hired from B a horse and buggy to make a certain journey. While returning over the regular route A drove at a walk over a bridge which gave away and let the horse and buggy into the stream below. As a result the buggy was much damaged. A was not laible for the repairs to the buggy, for he was in no way to blame.

The hirer is not only responsible for his own default or negligence, but for that of his servants or children.

370. As to Animals.—It is the duty of the hirer of an animal to supply it with proper food, and should it become sick and unable to perform the service for which it was hired, the hirer should put it aside, and, if need be, secure another to complete his work or journey. The expense of this will devolve on the owner, for he has warranted by implication that the animal is capable of that for which it was hired.

371. Duties of the Hirer.—It is the duty of the hirer upon the termination of the bailment, to deliver the thing back to the letter, and to make recompense to him, if such recompense was not made in advance. He should deliver it back in proper condition.

HIRE OF SERVICES.

372. Definition.—Hire of services is a delivery of goods to another to have some work or service performed upon them for a compensation. It differs from commission, already treated, solely in the matter of compensation.

A watch is left with a watchmaker for repair. Paper is left with a printer on which he is to print certain matter. These are both cases of hire of services.

373. Duties of Workman.—A workman should do the work himself, unless from its nature or from the circumstances of the case it is understood that it is not a personal trust. If it be such work as is ordinarily done by proxy he may so do it, but unless the usages of trade sanction it, he should do it himself. The workman must use the materials furnished him, but if any are furnished by him they must be such as are proper for the use intended.

374. Skill Required.—A workman should do the work in a skillful and workmanlike manner, for the law presumes that every workman, who holds himself out as such, and thereby solicits the hire of his services, possesses the usual and ordinary degree of skill in that business. If any damage results from his lack of proper skill, though he may have done the best he could, he is liable, for he should not have undertaken it. The hirer had a right to presume by his acceptance of the trust that he possessed the usual skill. Of course it may have been expressly understood that he did not engage the usual skill and in that case the workman will not be liable.

When one employs a physician, who holds himself out as such, he has a right to expect that he brings to bear ordinary skill, that is, such skill as is usually possessed by the ordinary practicing physician, and if he does not, he will be liable for any damage which may result from his lack of such skill. The same is true of a practicing attorney. If he lose a case through his lack of proper skill he is liable to his client.

375. Care and Skill.—Care and skill are two entirely different things. The care to be used to free the bailee from liability is that

which an ordinarily careful man uses of his own things under similar circumstances.

376. By Whom Loss is Borne.—When there is a loss of property delivered to a workman for service to be performed upon it and the workman is not at fault, the loss falls upon the owner. Indeed, it seems to be the rule that the loss follows the ownership of the property. Whether the workman could recover for the value of his services already rendered is not altogether settled. When the workman is employed to make a thing out of his own material, it is a case of sale and not one of bailment.

377. Rights of Bailee.—If a workman by a deviation from his instructions makes his work valueless, he can claim no compensation. If the article be still of some use and be received, he can claim the value of the work. If the deviation be important and the materials have lost their value the owner may abandon them and recover their value from the workman. If the deviation makes the thing more valuable and costly, the workman cannot collect for the additional cost, unless the change were assented to.

If the bailee fails to complete his work through his own fault his rights will depend upon the nature of the undertaking. If his contract is to work by the day he will be entitled to recover what his work is fairly worth after deducting all damages occasioned by his default. If his work is done under an entire contract the performance to precede the payment and is a condition thereof then he must finish the work before he is entitled to payment.

378. Liability of Third Person.—It is a settled principle of law that if one contracts to render personal services for another, for a consideration, any third person who maliciously induces or compels the letter to refuse to perform such services is liable to the injured party. This rule extends impartially to every grade of service.

379. Payment by Installments.—When material is furnished by the bailor and the services of the bailee are to be paid for in installments as the work progresses and there is a loss after one or more installments have been paid, the bailor loses what he has paid, and the bailee loses pay for that portion of the work which has been done but not accepted. Houses are often built on this plan and the question often arises.

380. Lien.—A workman employed to make up materials or to alter or repair an article has a lien upon it for his pay. It seems that he does not have the right to sell it but only the right to retain it. It is therefore called a possessory lien, a mere passive right of retention.

CHAPTER XXXII.

HIRE OF CUSTODY.

381. Definition.—Hire of custody is a contract for the hire of care and attention to personal property. In this kind of bailment there is usually no labor to be performed in reference to the thing bailed, but the custody is the main object.

382. Degree of Care.—This contract is for the benefit of both parties, hence the bailee is bound to use ordinary care, and is liable for ordinary negligence.

383. Agistors.—An agistor is one who takes in domestic animals to pasture. He may take such animals as he likes, and is bound to give to them ordinary care. Should any loss or injury occur as a result of his not using proper care, he will of course be liable. He must also use ordinary skill in their care. He has no lien for their keeping unless by special agreement. Being their proper custodian he can bring an action in his own name against any one interfering with his possession.

384. Warehousemen.—A warehouseman is one who receives goods or merchandise to be stored for hire. He must use ordinary care, and is liable for any neglect on his part to do so. He does not insure the goods, therefore he is not liable if they perish, provided he has not been guilty of negligence. He has a lien upon the goods for his storage charges, but he cannot retain the goods for a general balance due. If the goods are claimed by another, the warehouseman delivers them to him at his peril, for he must at least make satisfactory account to the bailor. It has often been decided in all

similar classes of bailment that when a loss occurs the bailee is obliged to explain how it occurred, after which the burden of proving negligence rests on the bailor.

385. Wharfingers.—A wharfinger is the keeper of a wharf where goods are received and shipped for hire. His duties, rights and liabilities are in most respects the same as those of a warehouseman.

386. Commission Merchants.—Commission merchants and all similar agents, being bailees for hire, are required to take ordinary care of all goods entrusted to them. They are not liable for any loss by fire or robbery; or from internal decay, unless it was occasioned by their lack of proper care.

387. Hotelkeepers.—Hotelkeepers are bound by the laws of bailment, and on account of the peculiar position of trust which they occupy, and their relation to the public, they are held to a stricter liability than the ordinary bailee for hire. In this respect the case of hotelkeepers is an exception to the usual rule of liability, where the bailment is for the benefit of both parties.

388. Duties.—A hotelkeeper is bound to accept all who present themselves, if he has the room, but he may refuse a disorderly guest. It is his duty to care for their goods with proper diligence.

389. Liabilities.—Instead of being responsible for ordinary care he is held to be an absolute insurer of the property committed to his care, except as to damage by the acts of God, the public enemy, and from the fraud or neglect of the owner himself. The hotelkeeper is responsible for the acts of his servants, and also for those of his guests, so far as they affect other guests. But he is not responsible when a loss occurs through a guest's own servant, or one who came as his companion. He is not permitted to refuse to accept the goods of his guest or to refuse to become responsible for them, but he may give notice to his guests that he will not become responsible for valuables, such as money or jewelry, unless delivered to him to be placed in the safe. If a servant of the hotelkeeper takes the luggage of a guest to carry to the cars, the hotelkeeper continues responsible for it until delivered at the cars. Whether in case of loss the burden lies on the landlord to prove proper care, or whether his negligence is presumed, has been variously decided, some States holding one way and some another. It has been decided in Illinois that the owner of

a sleeping car was not liable as an innkeeper for money stolen from a passenger.

390. Rights of Landlord.—While the landlord is obliged to receive all proper guests, if he has room, yet he may require them to pay in advance, and refuse to entertain them if they do not. He has a lien upon the goods of his guest for his bill. He has also a lien upon horses left with him for their keep.

391. Who is a Guest.—There is a distinction between an innkeeper and a boarding house keeper. An innkeeper holds himself out to entertain all travelers. The keeper of a boarding house usually makes contracts for a definite time. A guest in a public house comes without any bargain as to time, and may go when he pleases, paying only for the entertainment which he actually receives. The length of time he may remain will make no difference as to the relation he occupies—he will still be a guest. A landlord may be both an innkeeper and a boarding house keeper, and indeed it is not unusual for him to maintain both relations to different persons. The statutes of most States have regulated both inns and boarding houses, and when they have done so the common law requirements have been modified.

HIRE OF CARRIAGE.

392. Introduction.—This includes that large class of contracts by which goods or chattels are to be transported from one place to another. Those who transport goods for others are called carriers. The law designates both "private carriers" and "common carriers."

393. Private Carriers.—A private carrier is one who occasionally carries goods or chattels for others. As he works for hire he is bound to use only ordinary diligence and a reasonable exercise of skill. He is not liable if the goods are stolen or burned or if they perish from their own internal decay unless it was occasioned by a lack of proper care on his part.

He may by special contract enlarge his liability even to the extent of warranty.

COMMON CARRIERS.

394. Definition.—A common carrier is one whose business is to transport from place to place the goods or person of any one who may employ him. The business must be exercised as a public

employment, that is, he must hold himself out as ready to transport goods or passengers as a business. It includes railroads, express and steamboat companies as well as expressmen, street car companies and omnibus lines.

Common carriers may be carriers of goods, or of passengers, or of both. We shall first consider the common carrier of goods.

395. Duties and Obligations.—The common carrier is obliged to accept all goods that are offered to him for transportation without regard to whose they may be. In this regard his obligation resembles that of the innkeeper. This rule is a result of the public nature of his employment. He is liable to an action if he refuse to carry, but he may demand his fees in advance. He may refuse if his carriage be already full or if the goods be of a dangerous nature, or if they are not such as he carries in the known and usual course of his business. At common law he is not under obligations to charge all persons alike. He may show special favor to certain individuals by taking their freight at an unreasonably low rate without being compelled to do the same by others. He is entitled to a reasonable recompense from all. He is bound to transport with reasonable dispatch, and by the prescribed or customary route.

He is also bound to take notice if some goods are specially marked, as: "handle with care," "glass," etc.

396. May Refuse Freight.—A carrier may refuse transportation in a particular case, on the ground that his facilities are inadequate. He may also refuse transportation if the property at the particular time will be exposed on his route to extraordinary danger or to popular rage, or if he is under coercion and cannot freely exercise his vocation. A carrier is not bound to receive goods from one who is neither their owner nor the owner's agent, for he must not connive at a wrong. If he refuse wrongfully to receive goods, he is liable to the consignor.

397. Liability.—The liability of the common carrier owing to its public nature is, like that of an innkeeper, very strict. He is held to be an absolute insurer of the safety of the goods, the only exceptions being against the "acts of God" or the "public enemies." The acts of God are such as floods, lightning or tempest and the public enemies are those with whom the nation itself is at war and not merely robbers and thieves.

This responsibility begins as soon as the goods are delivered and received by the carrier.

398. Liability Limited.—In some States a common carrier is permitted to limit his common law liability by a general notice which is usually incorporated in the receipt or bill of lading. In others he can so limit his liability if it be brought especially to the shipper's notice and agreed to by him while in others he cannot limit it at all.

399. When Liability Ends.—When there remains no further duty to be done by the carrier his liability ceases. It is generally the custom for carriers to notify the consignee of the arrival of the goods and when such is the custom it should be observed. After the lapse of a sufficient time the carrier may put the goods in a warehouse, when his liability will be that of a warehouseman for ordinary care instead of a carrier. But if he is obliged to deliver them at the consignee's place of business or domicile, he must tender them there before he can claim ordinary liability.

400. Delivery.—Where and when delivery should be made depends altogether upon the custom of the place and the circumstances of the case. In large cities it is customary for express companies to make actual delivery either at the house or place of business of the consignee. Where such is the custom a compliance with it is one of the duties of the company. The delivery must be to the consignee or owner, or his agent, and the common law rule is that goods must be carried to his residence or place of business, and it will not be sufficient if they be left at the public depot of the carrier, unless there be a well-established usage to this effect. But this usage is now so common with railroads that there is little doubt but that it is now the law. The company is of course liable for delivery to the wrong person, and hence they often require the consignee, if unknown to them, to be identified.

401. Lien.—The carrier is entitled to a lien on the goods for his charges and for any charges advanced to other carriers. This lien he can enforce in any of the ways in which a party enforces a lien on personal property. To protect himself he may inquire into the title of any one who presents goods for transportation, and thus save himself from liability to the owner from whom the goods have been stolen.

402. The Carrier of Passengers is not liable for them in the same way in which a carrier of goods is liable. He is bound to make no distinction among those who offer themselves for transportation. A common carrier of passengers is liable only where the injury has arisen from the negligence of the carrier. He is not an insurer of passengers, but is liable for the results of the slightest negligence.

A railroad company is bound to provide a safe roadway and suitable carriages and to keep all in good condition. Its trains must be carefully handled and in general the greatest care and watchfulness must be exercised. It will be no excuse that the wrongful act of an agent was willful. The reason for the difference in the liability of a carrier of passengers and a carrier of goods is that the carrier of goods has entire control over them but passengers must be left much freedom of motion.

403. Rights.—The carrier of passengers has a right to prescribe reasonable rules in reference to receiving and handling them. He may insist on the fare in advance and that the passenger show his ticket. If he refuses to do either the carrier may eject him, using, however, no more force than is necessary, and not while the car is in motion.

The carrier may refuse any who are disorderly. In some States conductors of trains are clothed with police powers for the purpose of preserving peace on their trains.

404. Baggage.—In this country the railroads are required to transport not only the passenger but his necessary baggage. This may include anything of a personal nature which the passenger may need for his convenience and comfort. For the safety of this baggage the carrier is liable for the slightest negligence.

PRACTICAL REVIEW.

I. A owes B a note due Aug. 30, 1894. To secure it A pledges with B a note made by D to A's order, payable Jan. 1, 1895. A fails to pay his note when due. What can B do?

II. A was a guest at a hotel and had a watch stolen from his room. Can he recover its value?

III. A brings an action of replevin against B for chattels. B's defense is that he has a lien upon the chattels which were pledged with him by C. Suppose these were stolen from A, could he recover them from B?

IV. If A borrow of B $50, and give him in pledge as security a watch worth $100, what can B do to make his claim out of the security?

V. If A hire one horse and borrow another, both from B, and both are killed by the same accident, may B be liable for one and not the other?

VI. A traveler on a railroad checked his trunk. The trunk, instead of containing wearing apparel, is filled with fragile articles intended for sale. These are broken by the railroad employees in handling. Is the company liable for them?

VII. B, a physician, was on a train that was wrecked, and undertook, gratis, to attend a wounded person. If he treats him improperly is he liable for malpractice.

VIII. A makes a special deposit with his banker of ten United States bonds. The banker agrees to keep them in his vault along with his own securities, and without hire. The bonds are stolen by an employee of the bank without negligence of the banker himself. Is he liable to A?

IX. A railroad unloads merchandise at the end of its transportation, in one of its depots, and immediately afterwards the depot and contents are destroyed by fire. Is the company liable?

X. A railroad prints in its freight receipts a provision that it will not be liable in certain contingencies where it would be liable by the common law. How will this affect A who ships by this railroad, and takes its receipt for the goods?

XI. A agreed to carry gratuitously a cask of wine for B to market. In unloading the cask it fell, and some of the wine spilled. On what does A's liability depend?

XII. A took a valuable manuscript to a printer to have it set in type. The copy was distributed to different workmen. The building and contents were destroyed by fire. Was the printer liable for its value to A?

XIII. A sold B some grain stored in C's elevator, and endorsed the warehouse receipt. When B sends for the grain C refuses to deliver it until the storage is paid for. Has he a right to retain it?

XIV. A is a common carrier, and is offered goods for transportation by B, but refuses them because there is a strike on his line. Has he a right to refuse them?

XV. Suppose in the above case they are consigned to C; can C bring an action against A for his refusal to receive the goods?

REVIEW QUESTIONS.

1. What does the law of bailment include? 2. Define bailment. 3. Name the parties to a bailment. 4. How many classes of bailment are there? 5. Name and define the different degrees of care. 6. Name the different kinds of negligence. 7. Give a rule for determining the care necessary to free the bailee from liability. 8. Define deposit. 9. For whose benefit does it exist? 10. What care must the bailee use? 11. What are the duties of the bailee? 12. Can the bailee use the deposit? 13. Name the rights of the bailee. 14. Define commission. 15. For whose benefit is it? 16. What care must the bailee use? 17. What skill must the bailee bring to bear? 18. Has the bailee a lien on the property, and if so for what? 19. What are the bailee's duties? 20. Define gratuitous loans. 21. For whose benefit is it? 22. What care must be used? 23. Can the bailee use the property? 24. Can he loan it? 25. What expenses must the bailee bear? 26. If the thing perish what will determine the bailee's liability? 27. When and how can the lender obtain possession of the property? 28. What is the bailee's liability if he keeps the property beyond the time for which it was loaned? 29. Define pledge. 30. For whose benefit is it? 31. What degree of care must be used? 32. Can a pledge be held for obligations not yet incurred? 33. May the debt be for anything but money? 34. How far is delivery essential to a pledge? 35. How are negotiable notes pledged? 36. May the pledgee use the property? 37. What property has the pledgee in the property? 38. What is the pledgee's measure of damage against third persons who dispossess him? 39. Can one sell property he has pledged? 40. How could he deliver it? 41. What property does one get in property wrongfully pledged? 42. How does a pledge differ from a mortgage? 43. Name the different ways a pledgee may realize on a pledge when it is in default. 44. How can negotiable paper be realized on? 45. Into what subdivisions is hire divided? 46. What is the duty of the letter? 47. How can the hirer use the thing? 48. What is his liability if he use the thing otherwise than intended? 49. What degree of care must be used? 50. In case of an animal, what are the hirer's duties? 51. How does hire of services differ from commission? 52. What are the duties of a workman? 53. What skill must he use? 54. In case of the destruction of the property, who is the loser? 55. State the rule in this regard. 56. If the workman deviate from his instructions what are the rights of the parties? 57. If he fail to complete his work what are the rights of the parties? 58. What is the rule as to loss in case of payment by installments? 59. How far is one liable who induces a workman to quit his contract? 60. When has a workman a lien on the property? 61. What is an agistor? 62. What are his duties and liabilities? 63. What is a warehouseman? 64. What are his duties and liabilities? 65. How do commission merchants become bailees? 66. What is an inn keeper? 67. What are his duties? 68. What are his liabilities? 69. What are his rights? 70. Who is a guest? 71. What is a private carrier? 72. What is a common carrier? 73. What are his duties and obligations? 74. May he ever refuse freight? 75. If so under what circumstances? 76. What are his liabilities? 77. Can he limit by agreement his liability? 78. When does his liability end? 79. When and where should he make delivery? 80. What lien has he? 81. How does the liability of a carrier of passengers differ from that of freight? 82. What care must be used?

AGENCY.

CHAPTER XXXIII.

405. Definition.—Agency is the relation founded upon the express or implied contract of two parties by virtue of which one party is employed and authorized to represent and act for the other in dealings with third persons. The one who is thus authorized to act is called the agent, and the one for whom he acts is called the principal.

406. Classes of Agents.—Agents are divided into a variety of classes, based upon the extent or nature of their authority, and the character of their undertakings. The most important classification is in reference to the extent of their authority, and is into general and special agents. A *general agent* is one who is empowered to transact all of the business of his principal of a particular kind, or at a particular place. A *special agent* is one authorized to act only in a specific transaction. This distinction, as we shall see, is an important one.

407. Distinction.—A special agency being created for a particular transaction, is in its nature limited, and implies limitations of power. Of these limitations, third persons dealing with agents must inform themselves, unless by the principal's acts they might fairly infer that such limitations were not imposed. A general agency is in its nature general and unrestricted, except by custom and necessity. In other words, it has been said that a person dealing with a special agent is bound to observe that he is a special agent, and to know the extent of his authority, for if a special agent exceed his authority the principal is not bound. But if a general agent exceed his authority the principal is bound, provided the agent acted within the ordinary and usual scope of the business he was authorized to transact.

408. Who May be an Agent.—Any person who is competent to contract generally, is competent to act as an agent. The rule goes even further, and renders many competent as agents who could not

contract for themselves. The reason for this is that many persons are competent to execute what they would be incompetent to conceive or direct. Thus an infant above seven years may be an agent for many purposes, and even at common law a wife might be an agent for her husband. Corporations and partnerships are frequently organized for the purpose of acting as agents for others.

409. Who Cannot be an Agent.—One cannot be an agent if in his duties or his relations to others, he would be compelled to assume inconsistent obligations. He owes a loyalty to the interests of his principal and he cannot discharge the duties of his position when his own interests are adverse. He cannot, unknown to his principal, act for both parties.

A, a real estate agent, is requested by B to find and purchase for him a piece of land. A, knowing that C is the owner of such property, secures from him the agency for its sale. He then represents to B that he has bought C's land, and to C he represents that he has sold his land to B. There is no sale.

An agent for a buyer contracts to employ his best skill to secure the property at as low a price as possible, and an agent for the seller contracts to get the best price possible. These duties are absolutely inconsistent, and one or the other must be neglected.

410. How Agents are Appointed.—It is the general rule of law that no one can become the agent of another except by the will of the principal. But to this rule there is an exception when the agency is created by law. An example of this is where a husband turns his wife away through no fault of hers, when she may pledge his credit for necessaries, even against his will. The will of the principal, mentioned in the general rule above, may be expressed in a variety of ways. It may be by word of mouth, by a written instrument, or it may be by specialty. In many cases it may be implied from the acts of the principal, or the agent's previously unauthorized acts may be adopted and ratified.

411. Nature of Appointment.—The larger proportion of agencies may be, and are, created by parol, but the statutes of many States[1] require that an agent created to make certain contracts must be appointed in writing. This class of contracts usually embraces those included in the Statute of Frauds. The appointment must always be of as high a nature as the trust to be executed, that is, if the

[1] Alabama, Arkansas, California, Colorado, Illinois, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania.

instrument to be executed by the agent must be under seal, the authority to execute it must also be under seal. In the absence of any statutory regulation to the contrary, unless the instrument to be executed is to be under seal, authority to execute a written instrument may be conferred orally, for an oral authority is of as high a nature as a written. The formal manner of appointing an agent is by power of attorney. This is an instrument under seal and is the authority that must be given when the agent is to execute an instrument under seal. If it be for a conveyance of real estate it should be so executed as to entitle it to be admitted for record. In those States where acknowledgment is necessary for that purpose, it must also be acknowledged.

Know All Men by These Presents, *That I, the undersigned, George H. McElvain, of the City of Galesburg, County of Knox and State of Illinois, have this day made, constituted and appointed, and do by these presents make, constitute and appoint L. H. Young, of the City of Chicago, in the County of Cook and State of Illinois, my true and lawful attorney, for me and in my name, to sell and dispose of, absolutely, in fee simple, the following described lot, tract or parcel of land, or any part thereof, situate, lying and being in the County of Cook, and State aforesaid, to wit: Lot 10, of Block 8, in Cooper's Addition to the city of Evanston, according to the recorded plat thereof, for such price or sum of money, and to such person or persons as he shall think fit and convenient; and also for me and in my name, and as my act and deed, to sign, execute, acknowledge and deliver such deed or deeds, and conveyance or conveyances, for the absolute sale and disposal thereof, or of any part thereof, with such clause or clauses, covenant or covenants, and agreement or agreements, to be therein contained, as my said attorney may think fit and expedient; hereby ratifying and confirming all such deeds, conveyances, bargains and sales which shall at any time hereafter be made by said attorney touching or concerning the premises.*

In Testimony Whereof, *I have hereunto set my hand and seal, on this tenth day of August, A. D. 1901.*

GEORGE H. McELVAIN. [SEAL.]

POWER OF ATTORNEY.

A power of attorney should be acknowledged, and in some cases, as in the above form, it should also be recorded.

412. When Agency is Implied.—Whenever a person has held out another as his agent, or has knowingly permitted such other to act as his agent, or when his acts have been such as to reasonably warrant the presumption that such other is his agent, he will not be permitted to deny it to the injury of third persons. In these cases the agent has apparent authority.

A stood by and permitted B to make a contract for him. He afterwards wished to repudiate the contract, claiming want of authority on B's part, but was not allowed to do so, for B's authority was implied.

A, knowing that B was collecting money on his account, made no objection. When B failed to pay it over, A attempted to again collect it from his debtor, claiming that B had no authority. It was decided that B had implied authority.

413. Notice to Agent.—Whatever comes to the notice of the agent in reference to the principal's business, is deemed to be notice to the principal. The principal is also presumed to know what the agent has done while acting for him.

CHAPTER XXXIV.

AGENCY—CONTINUED.

414. Introduction.—As we have previously remarked, there are three persons concerned in the law of agency, viz.: Agent, principal and third person. These each have rights, duties and liabilities to the other two. Rights will not be discussed, for the duties and liabilities of one party are generally reciprocally the rights of the other. For convenience these duties and liabilities will be discussed in the following order:

I. Duties and Liabilities of Agent.	1. To Principal. 2. To Third Person.
II. Duties and Liabilities of Principal.	1. To Agent. 2. To Third Person.
III. Duties and Liabilities of Third Person.	1. To Agent. 2. To Principal.

DUTIES OF AGENT TO PRINCIPAL.

415. Agent Must be Loyal.—The agent must be loyal to his trust. He must not have personal interests that are adverse to his principal's. An agent authorized to purchase property cannot become the purchaser himself, and if he does he will be held to hold it as a trustee for his principal.

A, a confidential agent of the lessee of a theatre, shortly before his principal's lease expired, secretly procured a lease of the theatre for a new term to himself. The court decided the lease was procured in violation of the agent's duties, and that he held it for his principal.

All profits made in the course of the agency belong to the principal. It matters not whether such profit be the result of the performance or violation of the agent's duty.

416. Agent Must Obey Instructions.—He must obey all reasonable and lawful instructions, and should he fail to do so, and a loss occurs thereby, he will be liable. He cannot, however, be held responsible for refusal to perform illegal or immoral acts. He may also be excused when a sudden emergency arises, which will not permit of delay for communication with the principal. In the absence of any positive instructions to the contrary, the agent will be justified in conforming to established usages and customs. The burden of proving disobedience of instructions lies on the principal.

417. Agent Must Not be Negligent.—The question of the care that the agent is bound to take of his principal's property, we have already discussed under the head of bailment. In addition to this the agent must use care and skill in the transaction of the principal's business. When the principal is made liable through the negligence of his agent, he can collect in turn from the agent the amount, including costs.

A was instructed by his principal, B, to secure an insurance policy of $1,000 on a certain house. A neglected to do so, and the house burning down, he was held liable for the $1,000, less the premium.

When a paper due at a distant point is left at a bank for collection, and it is forwarded to a local bank, there is a conflict of authority as to whose agent the local bank is. The question really is, is the transmitting bank liable for the neglect of the correspondent bank in making the collection and transmitting the proceeds, or is the correspondent bank liable directly to the owner? The former is held in some States[1] and the latter in others.[2]

418. Agent Must Account for Money and Property.—The agent is bound to account to his principal for all money and property which may come into his hands during the agency and by virtue of it. As has been remarked, all profits which result from transactions either within or beyond the scope of the agent's authority, belong to the principal. For this purpose it is the agent's duty to keep correct accounts. It is also his duty to keep the principal's property and funds separate from his own, and if he does so commingle them that

[1] New York, Michigan, Ohio, New Jersey, Montana and Indiana.

[2] Massachusetts, Connecticut, Maryland, Illinois, Wisconsin, Iowa, Mississippi, Missouri, Tennessee, Pennsylvania and Louisiana.

he cannot discriminate between the two, all such property and funds belong to the principal. In case it becomes necessary for an agent to deposit his principal's funds in a bank, if he would escape personal liability in case of the failure of the bank, he should deposit it in his principal's name in a bank of good credit.

419. Agent to Give Notice.—It is the duty of the agent to give his principal reasonable and timely notice of every material fact which would be necessary for the principal to know to protect his interests.

DUTIES OF AGENTS TO THIRD PERSONS.

420. Liability.—While an agent's duties, as such, are to his principal, yet in the performance of those duties he is bound to exercise a due regard for the rights of others. It is said that no man increases or diminishes his obligation to strangers by becoming an agent. He is liable in the transaction of his own business for any injury to others resulting from his fraud or negligence. So too, in transacting his principal's business, if he be negligent he is personally responsible for the result. It matters not that he was proceeding according to instructions, for no one can confer upon another authority to commit a fraud, or do an unlawful act. The principal also, in some cases, may be liable. The agent is liable:

1. When he exceeds his authority.
2. When the principal is unknown.
3. When the agent contracts personally.
4. When it is the custom to become personally responsible.

421. When he Exceeds his Authority.—No one is supposed to know so well as the agent himself what his authority is. He may bind the principal, but when he exceeds his authority he will be bound himself, and it matters not that he acted in good faith.

422. When the Principal is Not Known.—The agent is made personally responsible in this case, because the contract must have been entered into on account of his responsibility.

A committee appointed by a political meeting ordered a public dinner. It was held that the members of the committee were personally responsible for the cost of the dinner.

423. When Agent Contracts Personally.—Often, for the sake of his interest in the contract, the agent agrees to become personally

liable. He may also become responsible by his failure to use apt words in the contract, and thus, while intending to bind the principal, may really bind himself, as signing a note C. D., agent of A. B., instead of A. B., by C. D., his agent. See sec. 141.

424. When the Agent has Received Money.—When money has been paid to an agent, through mistake, by a third person, and he is notified of the mistake, and afterwards turns it over to the principal, he is liable, but if he paid it before notice, he is not liable. So when an agent receives money to be paid over on the happening of a certain contingency, if he pays it over to the wrong person before the happening of the contingency, he is responsible to the rightful owner.

425. Public Agents.—The duties of a public officer are prescribed by law, which every one is presumed to know. Consequently, a public officer does not become personally liable when he exceeds his authority. While this is the general rule, there are many cases when he will be responsible, and this depends solely on the circumstances of each case. It is said that whenever the law imposes on an officer ministerial duties, in which a private individual has a special and direct interest, the officer is liable to such individual for his failure or neglect to perform them properly.

CHAPTER XXXV.

LIABILITIES OF PRINCIPAL TO AGENT.

426. Payment of Compensation.—One of the most important claims that the agent has upon the principal is for compensation. The amount may be expressly agreed upon, or it may be agreed that it shall be determined in a certain way, as a certain per cent of the business done. There are also cases where the promise to pay any compensation must be express, for it will not be presumed, as where the parties are near relatives, or members of the same family.

No recovery can be had for services, however valuable, if they have been rendered without the express or implied request of the principal. But where a party knowingly and without objection permits another

to render service for him, the law implies a promise to pay what it is reasonably worth.

427. Amount.—It is possible for the parties to agree that the full performance of the duty shall be a condition precedent to the right to recover any compensation. But if this full performance be excused or prevented by the principal, the agent will still be entitled to his commission, if he has done all that is necessary on his part. If the agency be terminated by the sickness of the agent, he is entitled to recover the reasonable value of his services up to the time of his incapacity. This is the rule, even though the contract be to perform a certain service before he is entitled to any compensation. Where the agent is employed at a fixed salary, and additional duties are imposed on him, he cannot ordinarily recover extra compensation in the absence of a promise to pay them.

428. Right of Recoupment.—The principal has the right to recoup any damages he may have suffered at the agent's hands, out of his compensation. But both the claim for damages and the compensation must arise out of the same transaction. A railway company may recoup from a conductor's wages damages resulting from a collision caused by his negligence.

429. Right of Reimbursement.—It is the principal's duty to reimburse the agent for all his advances and for expenses, incurred in the course of the agency, which were for the benefit of the principal. They must not however, be the result of the agent's negligence, neither will they be allowed where the agent makes a contract to perform a certain service for a gross sum.

430. Right of Indemnity.—If in the performance of a lawful act for the principal, the agent invades the rights of others, the loss should fall upon the principal, and not the agent.

An agent, by direction of his principal, cut timber upon the land of a third person, which land the agent supposed belonged to the principal. He was sued for trespass, but recovered in turn from his principal.

431. Agent's Right to Protection from Injury.—Every undertaking for the rendition of services is attended with more or less risk. Risks of this nature are as much within the knowledge, and perhaps more within the control of the agent than of the principal. It is therefore, the rule that the principal is not responsible to the agent for injuries received, which result from the natural and ordinary risk

incidental to the performance of the service. The principal is liable for an injury which is the result of his negligence. He must provide, not necessarily the latest and best machinery and tools, but such as are reasonably safe, and must keep them in a reasonable state of repair. If the agent discovers that the machinery is not in proper repair, it is his duty to report it, for in such case he cannot recover from the principal without notice, and a promise from the principal to repair, which promise was relied upon.

432. Fellow Servants.—Nothing is any better settled than that a master is not liable to a servant for an injury resulting from the negligence of a fellow servant engaged in the same business. Two brakemen are fellow servants but an engineer is not a fellow servant to a brakeman.

LIABILITIES OF PRINCIPAL TO THIRD PERSON.

433. Undisclosed Principal.—We have learned that when the agent fails to disclose his principal, he becomes personally liable. Should the principal be afterwards disclosed, he also is liable, at the election of the third person. This election must be made, to hold the principal, before he has settled with the agent in good faith, and on the basis that the agent alone was responsible.

434. Liabilities for Agent's Acts.—It is a principle of the law of agency that whatever lawful acts one does for another, and by his authority, are to be considered as the acts of that other. The acts must be lawful, for no one can authorize another to do an unlawful act. *What the agent does, however, must be in pursuance of his authority, either real or apparent, and within the scope of his business.* Third persons have a right to rely on an agent's apparent authority, and are not bound by secret instructions and restrictions. If such secret limitations are known to third persons when dealing with the agent, they are bound by them.

435. Liabilities for Agent's Tort.—The principal is liable for the wrongful or negligent acts of his agent, done in the transaction of the principal's business. Authority to do that particular act is not the criterion, but if the agent acted within the scope of his employment it is sufficient. If the agent goes outside of this he alone is liable.

A sent B to a saw mill to get some lumber belonging to him. At the mill B was given such ambiguous instructions that in addition to A's lumber he took C's. A was held liable.

An engineer ran his train when expressly forbidden to do so. A collision occurred and the company was held liable.

These were all acts within the scope of the agent's business. Should the agent step aside from his employment to do some act for himself, the principal is not liable. The owner of a horse is not liable to a third person for an injury caused by the negligent driving of a borrower, if it was not used at the time in the owner's business. The principal is not liable for the willful and malicious acts of the agent. This was formerly the plain rule of law, but the later cases make no distinction between a willful or malicious act and a negligent one, resting both cases on the question whether the act was done in the scope of the business of his employment.

CHAPTER XXXVI.

LIABILITIES OF THIRD PERSONS TO AGENT.

436. Liabilities on Contract.—While the agent acts in pursuance of his authority for a disclosed principal, the contract binds his principal alone. Yet we have seen that an agent may act under such circumstances as to bind himself, as when he fails to use apt words to bind his principal. In such cases the third person is bound to the agent. On a note payable to A B, agent for C D, or A B, president of C D company, the action may be brought by the agent. He is also bound where he expressly agrees to be. (See sec. 423.)

437. Liabilities in Tort.—For all injuries committed by third persons to the agent personally in the course of his employment, the agent may sue and recover in his own name. When the agent has a special interest in his principal's property in his possession, he may maintain an action against any person who wrongfully injures or converts the goods. In some cases he may even maintain an action against the owner or principal.

LIABILITIES OF THIRD PERSONS TO PRINCIPAL.

438. Liabilities on Contracts.—The principal has the undoubted right to sue upon contracts made by the agent in his name. He also has a right to an action on all contracts made by the agent in his behalf, but in the agent's name, if they are not under seal. But if the contract involved considerations personal to the agent, such as pledging his personal credit, the third person is bound to the agent alone. The principal may recover money paid out by the agent through mistake, coercion or without consideration.

A bookkeeper embezzled the funds of his principal, and with the money bought real estate, which he took in the name of his wife, who knew the source from which the money had been obtained. It was held in equity that the principal was entitled to recover the property.

439. Liabilities for Torts.—For wrongs done or injuries committed by third persons to his property while in possession of the agent, the principal may recover in the same manner as though no agency had existed. A third person is liable to a principal for wrongfully inducing an agent to abandon his undertaking. If one contracts for a consideration to render personal services for another, any third person who maliciously induces the party who contracted to render the service, to refuse to do so, is liable to the injured party for damages. For the same reason the principal may recover against one who wrongfully prevents the agent from performing his duties, whereby the principal is injured.

DISSOLUTION.

440. Manner of Dissolution.—An agency may be dissolved or terminated in any of the following ways:

I. By Original Agreement.	1. By Lapse of Time. 2. By Accomplishment of Object.
II. By Act of the Parties.	1. By Principal. 2. By Agent.
III. By Operation of Law.	1. Death. 2. Insanity. 3. Bankruptcy 4. Marriage.

441. Original Agreement.—When the agency was originally created, to endure for a given period, or until the happening of a certain event, the expiration of that time or the happening of that

event, terminates the agency. So where the agency is created for the purpose of accomplishing a certain object or objects, the accomplishment of that purpose will terminate it.

A was employed by B to purchase a certain piece of real estate. In August A delivered the deed to B, and was paid the purchase price to be paid the vendor. He was also paid his commission. In October A bought the same property at a tax sale, and in an action by A to recover the land, B claimed that A was still his agent at the time of purchase, but the court held that the agency terminated in July, when the object of the agency was accomplished.

442. Dissolution by Act of the Parties.—It is well understood that the principal may revoke the agency at any time, provided the agent's authority is not coupled with an interest in the subject matter. Aside from this it matters not whether the principal has or has not good reasons for so doing. This is true even though the authority be in express terms declared to be "exclusive" or "irrevocable." While the principal has the power to revoke the agency, he may subject himself to a claim for damages if he does so contrary to his agreement. When the agency is coupled with an interest the principal has not the power to revoke it.

An instance of an agency coupled with an interest is where A loans B money on collateral security and instead of taking a direct endorsement takes a power of attorney to endorse at any time he may deem it necessary. This power of attorney cannot be recalled by B at his pleasure.

There is a clear distinction between the right to revoke and the power to revoke. The principal may have agreed that the confidential relation shall exist for a certain time, but this is a contract that the law will not require to be specifically performed. Thus, while the principal may have the power to revoke, he may not have the right to do so. But even in such cases the principal may be justified in terminating the agency, as in case of the agent's incompetence or misconduct.

443. Renunciation by Agent.—The agent may renounce the agency at any time, being liable for damages to his principal for any breach in his contract. As has been remarked, an agreement for personal services will not be specifically enforced. If the agent be required to do an unlawful act, he is justified in renouncement.

444. Renunciation by Operation of Law.—Such changes in the conditions, capacity and surroundings of the parties, or the subject matter, may occur, as to render the continuance of the relation imprudent or impossible. It is then said to terminate by operation of law. The death of either principal or agent works a dissolution.

If however, the agency is coupled with an interest, it is not dissolved on the death of either the principal or the agent. If executed afterwards, by the agent or his representative, it is sufficient.

A desires to give B $500 out of his estate. He draws a note for that amount in B's favor and gives it to C with instructions to deliver it immediately after his (A's) death. This will not be valid for C's authority ceases at A's death.

On the death of one partner, the partnership is dissolved, and therefore the authority of an agent appointed by the firm ceases.

445. Renunciation by Insanity.—The insanity of either party also renders the termination of the agency necessary. The rule of an interest in the subject matter, however, applies in this case also.

446. Renunciation by Bankruptcy.—The bankruptcy of the principal also works a dissolution, for this divests him of all control over his property and affairs, and the subject matter of the agency passes from his control. It is not the mere inability to pay his debts which causes the dissolution of agency, but the fact that he surrenders his business and the law assumes control of his affairs. The bankruptcy of a business agent dissolves the agency, but not when his authority is to do a formal act.

447. Renunciation by Marriage.—A man gave a power of attorney to another to sell his homestead, but before the sale was effected the principal married. It was held that the marriage revoked the authority. Only such powers as will defeat or impair rights acquired by the marriage of a principal will be revoked. At common law the subsequent marriage of a *feme sole* revoked all agencies created by her, and this is still the law where the statute has not clothed her with full power to deal with her own property as a *feme sole.*

448. Renunciation, When Takes Affect.—An agency is terminated as to the agent as soon as he is notified of such termination, except in case of death, when it terminates as to all parties the instant of the death. Even a termination on the grounds of the insanity of either party does not take place until notice is received. As to third persons, the rule is the same, the agency terminates as soon as they receive notice of it. For this reason the principal should at once give notice to all third persons that have had dealings with the agency.

PRACTICAL REVIEW.

I. A is agent for B, and as such agent makes a contract with C in his own name, C being ignorant of his agency. Can B enforce this contract against C?

II. A, an agent to sell goods, made without authority false and fraudulent representations to a purchaser in regard to the goods. Is his principal liable for his deceit?

III. An agent entered into a contract on behalf of his principal after the principal's death, which was unknown to both the agent and third person. Are there any circumstances under which this contract would be binding?

IV. Suppose in the above case the principal instead of dying had become insane. Would the contract be binding?

V. A consigns a car load of flour to B, to be sold on commission. Is B a general or special agent?

VI. B, as agent for A, has had dealings with C. After revocation of his authority, B continues dealing with C, C having no knowledge of the revocation. What would you say were C's rights?

VII. A cashier pays a genuinely signed check of a depositor which has been fraudulently raised to a larger amount. On whom will the loss fall in this case?

VIII. A made an offer by letter to B to sell him a horse. B being unable to read the letter, had it read to him by his wife, who in reading substituted the word cow for horse. B then had his wife write a letter to A accepting the offer. What are the rights and liabilities of A and B respectively?

IX. A made an oral offer to B, giving him three days in which to accept. On the second day B wrote a letter of acceptance, and on being told by C that he expected to see A that night, gave C the letter to deliver. C destroyed it. What are the rights and liabilities of the parties?

X. A is a real estate and insurance agent. As such he is employed by B to look after certain buildings. B directs him to have them insured, which he does in one of his own companies. In case of fire what grounds would the insurance company have for a refusal to pay the loss?

XI. A man gives his coachman authority to sell his horse for a certain price. The coachman sells the horse and warrants him to be sound. There is a breach of warranty. Is the principal liable? Why?

XII. A owns several brick yards, and puts B in charge of one with instructions to hire only a certain number of men. He hired more. Is A liable for their wages? Why?

XIII. A delivery man is in the habit of reckless driving. His employer forbids it, but in a few days, while delivering goods, he injures B by his carelessness. Against whom has B a claim for damages?

XIV. An engineer was injured by a wreck caused by a defect in his engine. He had complained of this defect to the proper official, who had promised to have it remedied. Is the company liable to him?

XV. A, apparently acting in behalf of B, borrowed $500 to pay a mortgage on B's property. The money was used for that purpose, but B denies that A had any authority to borrow it for him. Is B liable?

XVI. How would it be in the above case if A had previously agreed to pay this mortgage?

XVII. A was given a note to collect for B, and out of the proceeds was to retain sufficient to repay him for advances already made to the principal. Before the note falls due B seeks to revoke A's authority. Can he do it?

XVIII. B, a banker of Chicago, received from A for collection a note due in Detroit, Mich. B forwards the note to the First National Bank, of Detroit, which is so negligent in the collection of it that a portion of it is lost. To whom must A look for his damages?

REVIEW QUESTIONS.

1. Define agency. 2. Into what classes is it divided? 3. Define each. 4. What is the practical necessity of such a division? 5. Who may be an agent? 6. Can a corporation be an agent? 7. Who cannot be an agent? 8. How are agents appointed? 9. Is an agency ever implied? 10. Does the law ever create an agency against the will of the principal, and if so when? 11. Must any agents be appointed in a particular way? 12. What is the formal method of appointing? 13. When is an agency implied? 14. What are the duties of the agent to the principal? 15. How far must he obey instructions? 16. When will he be justified in ignoring them? 17. What care must he use? 18. In your State whose agent is a correspondent bank to whom paper has been forwarded for collection? 19. To whom belongs the profits of an agency? 20. To whom do the profits resulting from a disobedience of instructions belong? 21. What is the doctrine of notice as applied to agency? 22. When will an agent become liable to third persons? 23. When is a public agent liable? 24. When he exceeds his authority whom will he bind? 25. When money has been paid an agent through mistake and he turns it over to his principal, is the agent liable? 26. What are the liabilities of the principal to the agent? 27. How far has the principal the right of recoupment? 28. When can the agent claim indemnity? 29. How far and under what circumstances can the agent claim protection from injury? 30. What is the rule as to injuries received through fellow-servants? 31. When, if at all, can a third person hold a principal who was not disclosed at time of contract, but was later? 32. Is the principal liable for the agent's torts? 33. Are there any torts for which he is not liable, and if so what are they? 34. For what contracts may the agent sue third persons in his own name? 35. For what torts may he sue in his own name? 36. Are there any contracts made by the agent that the principal cannot sue upon in his own name? 37. How may an agency be dissolved? 38. When can the principal revoke the agency? 39. When can he not? 40. Suppose the authority be for a certain time or states that it is irrevocable, can it be revoked? 41. How is an agency dissolved by operation of law? 42. When does the termination take place? 43. What is the doctrine of notice in this respect? 44. When will bankruptcy of the agent terminate the agency?

PARTNERSHIP.

CHAPTER XXXVII.

449. Definition.—A partnership is the relation existing between two or more persons that have combined their property, labor or skill in the transaction of business for their common profit. The parties to this relation are called partners.

Partnership resembles agency in that each partner who transacts business for the firm is considered as an agent for it. Hence many of the principles of agency are likewise applicable to partnership.

450. Partnership, How Formed.—The contract by which persons assume the relations of partners is not included in the Statute of Frauds, consequently it may be oral. If the partnership be a complicated one and the amount large or the time for which the partnership is formed be long it is always prudent to commit it to writing. Sometimes a partnership is formed by implication. In this case the parties hold themselves out as partners in such a manner as to lead third persons to believe them to be such. They may not in fact be partners but having secured credit as a result of their action they will be estopped from afterwards denying the partnership.

When the contract of partnership is in writing it should for reasons stated in Sec. 131 be full and explicit.

451. What the Contract Should Contain.—The articles of copartnership should specify the firm name, the duration of the partnership, and the amount to be contributed by each. If one is to be relieved from the management of the business it should so state. If each is to give his entire time and attention to the business he should be obligated to do so. It should state the nature and scope of the business and the manner of the division of the profits. In many cases it is desirable to limit the amount that may be withdrawn by each partner and in case more than the limit is withdrawn to give to the other

partner or partners the right to dissolve the partnership if the excess be not returned upon notice.

Sometimes each partner is obligated that he will not endorse a note or become surety for another without the consent of his partners, for by so doing he is liable by becoming insolvent to work a dissolution of the partnership.

Any other provisions peculiar to the case should also be inserted.

452. Kinds of Partners.—Partners may be, (1) *real or ostensible*, (2) *dormant or concealed*, (3) *nominal*, (4) *limited or special.*

A real or ostensible partner is one who is published as a partner and in fact is a partner accepting all the benefits and risks of the partnership.

A dormant or concealed partner is sometimes called a silent partner. He is not published to the world as a partner but in fact is one. Being unknown as a partner, he is in a position to share the profits of a prosperous business and to avoid personal responsibility in case of failure. Should his position be discovered he becomes a real partner and is liable as such whether creditors trusted the partnership on his account or not.

A nominal partner as the name implies is a partner in name only. His name appears in the business but in reality he has no interest in it. Persons of influence often lend their credit in this way to near relatives. He does not share the profits but in case of failure he is liable for the debts of the partnership in the same manner as if he were a real partner. In fact he is a partner so far as third persons are concerned.

A special or limited partner is one whose liability is limited by the amount of his investment. He is solely a creature of statute being unknown to the common law.

453. Who May be Partners.—Those who are competent to contract generally may become partners. In states where the statutes have given to married women the right to contract she can also become a partner especially with the consent of her husband.

454. Firm Name.—It is usual for the partners to fix upon a firm name or title by which they will be known. The law gives them the greatest latitude in this regard. They may choose the name of one of the partners or they may go outside and adopt a name that does not include the name of any partner.

Sometimes states by statute forbid the addition of & Co. when it does not represent some one. All suits at law must be brought in the names of the individuals composing the firm.

455. Duration of Partnership.—The partnership being formed by the voluntary consent of the partners they may fix the period of its duration and in many cases do so. If no limit is fixed upon, it exists at the pleasure of any partner who may terminate it by withdrawal. While its duration may not be expressly stated yet it may be implied from the circumstances, as where the partnership appears to have been formed for a single transaction.

The partnership may exist for the life of the parties, but it requires an express stipulation to continue it beyond the death of either partner. In no such case will its continuation beyond the death of any partner be presumed.

456. How Property Held in Partnership.—Partnership property is held jointly. Each partner owns an undivided part, and each is entitled to the possession of every parcel. Neither can say this is my part and that is his. They are joint tenants without the right of survivorship. (See sec. 21.) Partnership further differs from joint tenancy in that a joint tenant cannot dispose of the interest of the other, while in partnership each partner has the power to dispose of the entire property. In case the partnership property be real estate, purchased by partnership funds for partnership purposes, it is firm property, and liable for the firm debts, but if not so purchased and held it belongs to the partners individually. In firm real estate the widow of a partner has no dower until the firm debts are paid. In case of the sale of real estate held by the firm, each member of the firm must join in the conveyance, by signing his name and affixing his private seal.

457. Losses and Gains.—It has been said that sharing in the gains and losses is one of the first tests of the existence of a partnership, for no real partnership can exist that does not consider the element of profit. The partners usually determine in their agreement how and in what proportion the gains and losses shall be divided, but in the absence of any such agreement, the law presumes that they are to share equally, notwithstanding their investments may appear to be very unequal. But the fact that a person receives a portion of the profits will not alone make him a partner. This will depend

upon the circumstances of each case, considering the intention of the parties and the way in which the alleged partner was held forth to the public. For as we observed in agency, which partnership much resembles, individuals may not be partners as between themselves, yet as to third persons they may be. The question frequently arises when a clerk or agent is employed upon an agreement, that his services shall be compensated for, not by a fixed salary, but by a share of the profits. Unless the agreement gives him an interest in the capital stock, and the right to an accounting, he is not a partner, and cannot be held as such.

It may be agreed that a partner shall share in the profits, but will not be liable for the losses. This agreement is valid as between themselves, but like all such agreements, it will not be binding upon third persons who have no knowledge of it. If the creditor knew of this agreement at the time of extending the credit, he is bound by it.

CHAPTER XXXVIII.

PARTNER'S AUTHORITY AND LIABILITY.

458. General Rule of Authority and Liability.—It is a general rule that the firm and all its members are bound by the acts and the contracts of one partner, while acting within the scope of the partnership business. This power of one to bind all arises from the agency which all confer on each other. It also rests upon the community of interest whereby each partner owns the whole in common with all the others.

459. Scope of Business.—Every partnership is created for transacting a certain kind or kinds of business. Outside of this a partner has no power to bind the firm. Third persons dealing with the firm are supposed to take notice of the nature and scope of the business before extending to the firm any credit, and hence a partner who acts in a matter entirely outside of this, does not bind the firm. Thus, a firm organized for the purpose of conducting a wholesale jewelry business would not be bound by one partner who agrees to purchase in the firm name a stock farm.

460 Partners May Bind the Firm.—The firm is responsible for any acknowledgments, admissions, or representations of a partner transacting partnership business. Any fraud he may commit in such matters will bind the firm, for they have held him out as a person worthy of confidence, and besides, they must share in any profits arising out of such fraud. One partner may compromise a debt either owing to or by the firm, and he may also assign firm property in satisfaction of firm debts. Each partner may make or endorse negotiable paper for the firm. He may also sell and transfer the entire partnership assets. He may borrow money in the firm name, but if the partnership name be the name of one partner, a note signed by him is presumed to be his individual note, and the contrary must be shown. It matters not that money borrowed in the firm name by a partner was misapplied by him, the firm will still be bound.

461. Partners Cannot Bind the Firm.—A partner cannot bind his copartners by submitting a partnership question to arbitration; neither can a partner give the firm paper in payment of his individual debt. It has also been held that a partner cannot apply the firm's funds to the payment of his own debts. Outside of a special authority a partner cannot bind the firm by becoming surety for another. One partner cannot bind his copartners by contracts under seal. It is not altogether settled whether one partner can make a general assignment of firm assets for the benefit of firm creditors, but the weight of authority seems to be in favor of it.

462. Relations to Each Other.—While a partner may make many contracts that will be binding on the firm, yet if they suffer any loss from his gross negligence or fraud, he will be liable to the other partners. So if he violate any of the provisions of the partnership agreement, he is liable. It might easily be inferred from this that the partners may make any agreement they choose, limiting the power of each partner to bind the others, but such an agreement is void as to third persons who have no knowledge of it.

In the absence of an agreement to the contrary, each partner is bound to devote his best skill and endeavor to the interests of the copartnership, and he cannot make a charge for so doing. He should never permit a private interest to be at variance with the joint interest, or engage in competition with the joint business. If he steps in and appropriates firm business to himself, the profits will belong to the firm.

463. A Partner's Liability.—The partners cannot, by an agreement among themselves, release each other from a personal responsibility for firm debts. The firm assets are first liable for the firm debts, after which the partners are individually responsible for the full amount of the indebtedness. If in an insolvent firm of three members two have no property beyond their interest in the firm, and the third is wealthy, he will be obliged to pay the debts of the firm.

A somewhat difficult question arises when a partner is engaged in business outside of the firm, and becomes insolvent. His private creditors may seek to attach or levy upon his interest in the partnership. The general rule is that their claim will be postponed to the claim of the firm creditors. Hence, if the firm be also insolvent, there will be nothing remaining of the firm's assets for the individual creditors. This rule is said to exist, not because the firm creditors have a superior right to the preference, but because of the equity existing between the partners. If the individual creditors be allowed to withdraw a partner's interest, this would leave more of the firm debts to be paid from the private funds of the remaining partners. It would be in effect requiring these partners to pay the insolvent partner's private debts.

A common rule is that in levying an execution against one partner for his private debt, the sheriff may take possession of the entire joint property to invoice it, but he cannot divide it. He can only sell the partner's interest in it, but cannot deliver exclusive possession, for the debtor himself had no such right. The purchaser becomes a tenant in common with the remaining partners, and holds his share in any case subject to an accounting between the parties.

There is much diversity of opinion and practice as to the method to be pursued in this case, and we have only attempted to give above one method of procedure. The student should consult the decisions of the courts of his own state before acting.

That the partnership assets are reserved for the firm creditors, is the universal rule, but whether the private assets are reserved for the private creditors is not so well settled. The latter is the law in Illinois and in many other States.

CHAPTER XXXIX.

DISSOLUTION OF PARTNERSHIP.

464. Dissolution, How Effected.—A partnership may be dissolved in any of the following ways:

I. By Agreement.
II. By Act of One Party.
III. By Decree of Court.
IV. By Operation of Law.

465. Dissolution by Agreement.—The contract of partnership being a voluntary one, it is perfectly proper that the partners should in like manner be able to terminate it at any time. The contract of partnership often specifies the length of its duration, and when it does so, the partnership terminates accordingly, unless by a further contract either express or implied, it is unanimously agreed to extend it. If no period is so fixed, it is presumed to exist at the pleasure of any partner. If the partnership be formed for a single transaction, or for a series of them, it will be terminated when its object is accomplished. The dissolution should be made with due notice to the other partner or partners, and at such time and in such a manner as not to cause unnecessary injury to them.

466. Dissolution by Act of One Partner.—A dissolution may take place when a partner refuses to act with the other partners, or when he engages in other business. A dissolution is also effected when one partner assigns his interest in a partnership. The partners are not obliged to accept the purchaser as a partner, for he may be objectionable to them. Neither is the purchaser obliged to become one. If, however, the partners consent to do so, their consent has the effect of dissolving the old and creating a new partnership.

In this will be seen a distinction between a *power* to do a thing and a *right* to do it. While the partner has the power to assign his interest, he may have no right to do so, and is liable for any breach of contract with his partners, or for any loss resulting to them therefor.

467. Dissolution by Decree of Court.—A court of equity will, for just and reasonable causes, decree a dissolution of a partnership. It must be understood, however, that such a court will not interfere for slight and trivial causes. When a court decrees a dissolution it usually appoints a receiver, who takes charge of the firm's business, collects all debts due the firm, pays all its obligations, converts its assets into cash, and divides the residue according to the interest of each.

468. Grounds for Decree.—When the business proves to be impracticable, a decree will be granted. This may result from the inability of one or more partners to fully carry out their part, or it may be on account of the undertaking itself being visionary. One of the partners may prove to be so grossly immoral or intemperate, or exhibit such a lack of good faith as to imperil the success of the venture. He may be careless and reckless in his conduct of the business. So, too, one partner may exclude the others from their share in the management of the business, or may deny them access to the books of account.

Long and continued absence of one of the partners, or his change of residence to another State, and his engagement in other lines of business, so that the interests of the other partners are prejudiced, have been deemed just grounds for a dissolution. Continued quarreling among the partners, and the inability or incapacity of one partner to attend to business, have likewise been held sufficient.

469. Dissolution by Operation of Law.—Whenever the state or condition of a partner is so changed that he is incapable of acting for himself, the partnership is said to be dissolved by operation of law. When a copartnership is formed, it is presumed not only that the parties are competent to contract, but that they will continue so. If for any reason the law makes a change in his legal status, the remaining partners will be relieved from their contract of copartnership, and this without any affirmative act on their part, but *ipso facto.*

If a partner becomes insane, or a spendthrift, or if for any reason he is placed under guardianship, he is thus incapacitated to act either for himself or the partnership. So, by the common law, the marriage of a female partner will dissolve the partnership, but doubtless this is not now the law in most States.

If the partner's interest be sold on execution against him, it works a dissolution, for the purchaser is not a partner. The bankruptcy

or insolvency of a partner dissolves the partnership, for his property passes into the hands of his assignee, who has no powers except to wind up his affairs.

As alien enemies cannot contract, neither can they continue as partners, for this continuance is but the fulfillment of a contract. Lastly, the death of a partner works a dissolution. This dissolution takes effect like the dissolution of an agency in case of the death of the agent, immediately, regardless of whether third persons have notice of it or not.

470. What Powers Cease.—When a dissolution occurs there is a change in the relations of the partners and in their rights and powers. They can no longer use the partnership property for the purposes of trade, but can only make such contracts as look to the settlement of the partnership affairs. One partner can neither make nor endorse negotiable paper in the firm name. He cannot create new obligations nor vary those already made.

471. What Powers Remain.—On the dissolution each partner has the right to collect and receipt in the firm name for all debts due the firm. He has also the right to adjust and pay all unliquidated debts of the firm with the firm's money. Each may also sell firm property for cash and each may insist that all firm debts be paid before any division of assets is made between the partners.

472. New Powers Created.—When a partnership is dissolved the peculiar relation of partners as such ceases and they become at once tenants in common with all that relation implies.

When the dissolution is caused by the death of one partner, his personal representatives become tenants in common with the survivor with the right to demand an accounting but with no right to a part in the winding up of the business. This is a right belonging solely to the survivor or survivors.

473. Notice of Dissolution. — When a partnership is dissolved notice should be sent to all with whom the firm has had dealings. This is for the protection of the retiring partner not that he may avoid liabilities already incurred but that he may avoid future obligations assumed by the remaining partners. For the dissolution as to third persons takes place when they have had notice of it. When the dissolution occurs by operation of law no notice is necessary. It is customary when notice is necessary, to send a circular letter to each

person with whom the firm has had dealings and in the case of those who have had no dealings with the firm a newspaper notice is held as sufficient.

474. Limited Partnership.—This is a species of partnership unknown to the common law, but is in this country a creation of statute. It has been introduced into many States[1] of the Union, but is not now a common form of partnership.

The object is to enable one or more of the partners to be free from all personal liability beyond their investments.

While the statutes differ yet the following provisions are quite general:

1. There must be one or more general partners and one or more special partners.

2. The names of the special partners must not appear in the firm name.

3. The word "Limited" must always follow the firm name.

4. Investments of the special partners must be actually paid in.

5. The partnership agreement must be in writing, acknowledged and recorded in the county records and in addition, must be advertised for a certain period in a newspaper of general circulation in the community. The provisions of the statute in any case must be strictly complied with or the special partner will lose his privilege.

[1] Alabama, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia.

PRACTICAL REVIEW.

I. A and B compose the firm of A & Co. B withdraws and C takes his place, the name remaining the same. How far is C liable for the firm debts?

II. The firm of A is composed of A & B. C holds a note signed A. Whose note is it presumed to be?

III. A and B were partners as attorneys at law. A bought real estate for firm account, and gave a firm note without the knowledge of B. Is B liable on the note, and why?

IV. One partner transfers partnership property to pay his individual debt, the creditor having no knowledge that the property belongs to the firm. Does the creditor take a good title?

V. Two physicians are in partnership. One of them is guilty of intentional maltreatment of a patient. Is the other partner liable to the patient?

VI. In the above case what would be your answer in case one physician was guilty of unintentional malpractice?

VII. A and B are partners and insolvent. There are firm creditors and creditors of each partner. If there are both firm and individual assets, how will they be divided? How if no firm assets? How if firm assets but no individual assets of A?

VIII. A and B are partners. After dissolution one partner, without the knowledge of the other, gives a note in the firm name to a creditor of the firm. What are the rights and liabilities of the parties?

IX. A, who has property in business, employs B to take charge of and run the business; it being agreed that they should divide the profit and loss. What is their business relation, and why?

X. A, B and C are partners, with no agreement as to time the relation shall exist. If A and B collude to waste the assets, what can C do?

XI. A and B are partners, engaged in the iron business. A buys privately a large lot of iron, which he holds until the price rises. He then buys it on behalf of the firm. Are the other partners bound?

XII. A and B are partners under a verbal agreement to invest equally, and share gains and losses. B has private interests in another State, and goes there to attend to them, remaining for eight months. What remedy has A? Can he deduct the value of B's services from his share of the profits?

REVIEW QUESTIONS.

1. Define partnership. 2. What may be invested. 3. How does partnership resemble agency? 4. How is a partnership formed? 5. When is it formed by implication? 6. When the agreement is in writing why should it be full? 7. What should the contract contain? 8. How many kinds of partners are there? 9. Name them. 10. Name and define the most common kind. 11. What is a dormant partner? 12. Suppose he becomes known as a partner, what is his liability? 13. What is nominal partner? 14. Is he liable as a partner? 15. Who may become partners? 16. Are there any restrictions on the firm name? 17. For how long may a partnership continue? 18. How is partnership property held? 19. How does it differ from joint tenancy? 20. How does it differ from tenancy in common? 21. What is the rule as to the holding of real estate by the partnership? 22. Has the widow of a partner dower in firm property? 23. How are losses and gains presumed to be shared? 24. Are all persons who share in the gain, partners?

25. What is the test in this regard? 26. What is the general rule of a partner's authority? 27. What is meant by the scope of the business? 28. For what may a partner bind the firm? 29. For what can he not bind the firm? 30. Have the remaining partners any remedy in case one partner is negligent or acts fraudulently, and they are thereby injured? 31. What can be done when one appropriates firm business to himself? 32. What is the rule of liability of a partner? 33. What is the rule as to the application of firm assets when there are both individual creditors and also creditors of the firm? 34. In what ways may a partnership be dissolved? 35. How may it be dissolved by the act of one partner? 36. Can a partner assign his interest in a partnership? 37. Will the purchaser be a partner? 38. What are some of the grounds for a decree of dissolution? 39. How will a partnership be dissolved by operation of law? 40. On what grounds is the partnership said to be dissolved? 41. When a partnership is dissolved what powers of the partners cease? 42. What powers remain? 43. What new powers are created? 44. In case of dissolution by death of a partner who settles up the business? 45. When does such a dissolution take place? 46. When does a dissolution in general take effect? 47. What is a limited partnership? 48. What are the essentials of such a partnership? 49. Does your State provide for them?

CORPORATIONS.

CHAPTER XL.

475. Definition.—A corporation has been described as an artificial person. It is, in fact, a body of persons associated together by law, and endowed with the capacity of acting, for various purposes, as a single person. It differs in many respects from a partnership, and one of the points of difference is that no special power is required to form a partnership, while such power is necessary to the formation of a corporation. The corporation remains the same notwithstanding the individuals who compose it may change. It is, therefore, said that "a corporation never dies."

476. Importance.—Until recently corporations for business purposes were few in number, and of little importance. It is stated that no such corporation existed in this country in colonial times. But a decided change has been brought about, and corporations are formed now for the transaction of almost all kinds of business requiring large amounts of capital, or the co-operation of many persons.

477. Classes.—Corporations have been variously divided, the following classification being common:

- I. As to members.
  - 1. Sole.
  - 2. Aggregate.
- II. As to functions.
  - 1. Public or Municipal.
  - 2. Quasi.
  - 3. Private.
    - *a.* Religious.
    - *b.* Lay.
      - Charitable.
      - Civil.

478. Sole Corporations.—As its name implies, this is a corporation consisting of a single individual. In England the Sovereign, and certain church officers, were early held to be sole corporations, and in

their political capacity they may hold real estate, and it will pass to their successors in office. In some of the colonies this rule of law was acted upon, and no changes made in it when a separation from the mother country took place. Also in Illinois, by a special act of the legislature, the bishops of a certain religious denomination were made corporations sole for the purpose of holding title to the real estate belonging to the church. But it is not a common form of corporation in this country. This right of succession of a corporation sole does not extend to personal property, but is confined to real estate.

479. Aggregate Corporations.—This is the kind of corporation described in the definition, section 475, and what may be said hereafter about corporations in general will apply more particularly to this class. Such a corporation is composed of more than one person—it is an association of individuals.

480. Public or Municipal Corporations.—This is a class of corporations created by the government for political purposes. It includes cities, towns, villages, park and drainage districts. They are given by law the power to regulate certain local matters, and in pursuance of this power to pass certain ordinances, which must not conflict with the statutes. Such corporations issue no stock.

481. Quasi Corporations.—These corporations do not have all the functions or powers of the ordinary corporation. They may have the right to sue and be sued, and to hold property for certain purposes. Their functions are in a sense public, yet they do not pass ordinances. Of this kind are school districts, counties, commissioners of highways, etc.

482. Private Corporations.—A private corporation is one established by private enterprise. It matters not that its object may be of a public nature. A railroad company is a private corporation, notwithstanding it was formed to serve the public generally. It is a private corporation if it issues stock, and the stock is held by private individuals.

483. Religious Corporations.—Special provisions are made by most States for the regulation of the temporal affairs of religious organizations. A corporation organized especially for this purpose, and in

accordance with these provisions, is called a religious corporation. They do not issue stock, and their property is usually held by a board of trustees.

484. Lay Corporations.—These are divided into two classes, charitable and civil. Of the former class are hospitals and colleges which are dedicated to charitable purposes, and of the latter class the great body of private corporations which are created for pecuniary profit. The latter issue stock, and usually hold their property in the name of the corporation.

485. How a Corporation is Created.—From the definition of a corporation it might readily be inferred that it cannot exist of its own volition. It is endowed with its rights by law, that is by the sovereign power, which is the State or United States. They are created in one of three ways, viz.: (1) *By prescription*, (2) *by special act of the legislature*, and (3) *by general statute.*

486. By Prescription.—By this is meant that while no grant of power can be shown, yet the power has been exercised for so long a time that the courts will presume there was once a grant of power in existence, which has now been lost. It has been held that an exercise of the functions of a corporation for thirty years gives to the corporation a prescriptive right.

487. By Special Act of the Legislature.—In England charters are granted by the sovereign or parliament. In this country the legislature only is the source of all special charters. Application is made to the legislature by those wishing to associate themselves as a corporation. A regular bill is passed embodying the special powers and privileges granted, and this bill or charter is viewed in the light of a contract between the State and the corporation. The powers therein granted cannot be recalled or revoked unless the bill contains a provision to that effect. Designing men, with abundant means at their command, were often able to secure from legislatures valuable concessions which were unrevokable. For this reason the constitutions of many States now prohibit their legislatures from creating corporations in this way.

488. By General Statute.—It is now the common practice for each State to pass what is called a general incorporation act, by complying with which corporations may organize. The effect of this is to ren-

der the formation of a corporation a comparatively easy matter, and to this, as much as anything else, is due the great popularity of such bodies and their rapid growth in number. These acts specify the contents of the application to be filed, and specify the powers of the corporation. Congress has, by special act, incorporated two United States banks, and the ordinary national banks are organized under a general national statute.

489. A Corporator.—A corporator is one of those to whom a charter is granted, or who file an application to be appointed commissioners, with power to solicit subscriptions for and organize a certain corporation. The number of corporators or commissioners is fixed by law, but it is usually from three to seven. They being the originators of the proposed corporation, fix upon a name, the amount of capital stock, and the general purpose of its existence. Upon receipt of their authority, or commission, they may proceed to open subscription books for the capital stock.

490. A Subcriber is one who has signed a subscription list, agreeing to take some of the original issue of stock from the corporation. When the stock is finally issued, he is then often called a shareholder or a stockholder. This contract, like any other, may be enforced against him, and if he fail to pay for his stock according to agreement, he can be sued therefor, or his stock may be declared forfeited. It is, however, an implied part of a contract of subscription that it is to be binding against the subscriber only after the full capital stock has been subscribed. Indeed, by the law of many States, no charter will be granted until the capital stock has all been sold.

491. Capital Stock.—Capital stock is the sum fixed by the corporate charter as the amount paid in or to be paid by the stockholders. This is to be clearly distinguished from the property possessed by the company or the amount actually paid in. The capital stock remains fixed, though the value of the property of the corporation may fluctuate widely.

492. Organization.—When the capital stock has all been subscribed, the corporators or commissioners may, by giving notice, call a meeting of the subscribers for the purpose of electing officers, making by-laws, etc.

493. A By-Law is a permanent rule of action, in accordance with which the corporate affairs are to be conducted. The by-laws are made by the stockholders or board of directors in meeting assembled.

After the election of officers and the making of by-laws, etc., the corporators make their report to the proper State official, usually the Secretary of State. If all is found to be in accordance with law, a charter is issued, upon receipt of which the corporation is authorized to begin business.

494. Charter.—A charter is the instrument which creates the corporation, and which enumerates and defines its powers and privileges. When a corporation is created by general statute, no powers can be acquired in addition to the powers specified in the statute.

495. Issue of Stock.—The capital stock is divided into shares of a specified face value, and each stockholder is entitled to as many shares of the stock as the proportion which his subscription bears to the whole. As each subscriber pays his subscription, either in money or property, according to agreement, there is issued to him one or more certificates of stock. This certificate may be in the following form:

No. 18. Incorporated under the Laws of the State of Illinois. *10 Shares.*

The Chicago Time Lock Company.

Capital Stock, $50,000. CHICAGO, ILLINOIS. 500 Shares at $100.

This Certifies, *That* GEORGE REIS *is the owner of Ten Shares of the Capital Stock of* **The Chicago Time Lock Company,** *fully paid and non-assessable, transferable only at the office of the company, on the return of this Certificate.*

IN WITNESS WHEREOF, *the President and Secretary have hereunto subscribed their names and caused the seal* [SEAL] *of the company to be affixed at Chicago, Ill., this 25th day of August, A. D. 1901.*

Henry Templeton, Sec. *S. M. Erskine, Pres.*

This is the only evidence the stockholder has that he is a stockholder in the corporation, and therefore entitled to the rights and privileges of such. Stock is personal property and not real, even though all the corporation may own be real property. It is a chose in action.

496. Classes of Stock.—Stock may be either common or preferred. *Common stock* entitles the owner to a *pro rata* of dividends equally with all other holders of stock except preferred stockholders.

By *preferred stock* is meant stock which entitles its owners to dividends, up to a certain per cent, out of the net profits, before or in preference to the holders of the common stock. By *watered stock* is meant stock which is issued as fully paid up, when in fact the whole amount of the par value has not been paid in. By *deferred stock* is meant stock upon which the payment of dividends is expressly postponed until some other class of shareholders are paid a certain dividend.

CHAPTER XLI.

POWERS OF CORPORATIONS.

497. Implied Powers of Corporations.—The common law ascribes to all corporations certain incidental rights and powers, whether they are expressly enumerated in the charter or not. These are as follows:

I. To have succession.
II. To sue and be sued.
III. To purchase, hold and convey property.
IV. To have a common seal.
V. To make by-laws.
VI. To elect officers.
VII. To make contracts.

498. Corporations to Have Succession.—By this is meant that the corporation may exist even though all the stockholders may die or dispose of their stock. In case of the death of a stockholder, his personal representatives take his place as a stockholder, but not as an officer. It has been said that "a corporation never dies," but this does not mean that it exists forever, but only for the time mentioned in the charter or in the statute. This power of succession is a necessary element in the life of a corporation with a large list of stockholders. If the death of a stockholder dissolved the corporation, as it does a partnership in case of the death of a partner, no undertaking of any magnitude, or requiring time for its consummation, could be completed.

499. To Sue and be Sued.—A corporation has the right to institute suits in its own name, in all cases where an individual, under like circumstances, would have a right of action. It is necessary that a corporation, for its own complete protection, should have this power to sue in its own name instead of in the names of its stockholders.

500. To Purchase and Convey Property.—At common law in America a corporation may purchase and convey land. The only limitation upon this right of corporations is that the purchase must be a natural incident of the business specified in the charter, that is, it must be in accordance with the purpose of the corporation. The States have quite generally followed the English statute of wills, and have restricted certain classes of corporations in the taking of realty by a devise. The object of this is to prevent large bodies of land from falling into dead hands, hence the statute is called the statute of mortmain.

501. To Have a Common Seal.—A corporation is an artificial person. Natural persons are required by common law to have a private seal, so corporations are required to use a common seal in all cases where a natural person would be required to use a private seal. It was formerly supposed that a corporation could only manifest its intention by its common seal, but the rule is now as stated above.

502. To Make By-Laws.—We have previously observed (sec. 493), that a corporation by its stockholders can make by-laws. But if such power be given to the board of directors a majority may pass such laws. The by-laws must be framed strictly within the limits of the charter, and in accordance with the laws of the land.

503. To Elect Officers.—A corporation transacts its business through its officers and agents, and not through its stockholders. The right to choose these officers, then, is necessarily implied. In the election of officers a stockholder generally has a vote for each share of stock he may own. Consequently, if he owns a majority of the stock he can control the election. A majority of the votes cast will elect, even though only a small proportion of the shares are voted at all. To obviate this, and to give the minority stockholders a minority representation on the board of directors, constitutional provisions are found in a number of States.[1] This is effected by a

[1] California, Illinois, Missouri, Nebraska, Pennsylvania, West Virginia.

system of cumulative voting. Thus, if there are six directors to be elected, a stockholder who owns one hundred shares may cast six hundred votes; and these he may cast entirely for one, or distribute them among the six, as he may choose.

The statutes quite generally recognize the right of a stockholder to vote by proxy. This right did not exist by common law, but may be recognized by the by-laws. No particular form of proxy is necessary, though it should be in writing and signed.

It is also held as necessary for the protection of the corporation that its officers or agents may be removed for just cause, but the latter is a power that must be expressly granted in the charter or the statute.

Know All Men by These Presents, *That I, Edward O. Folsom, do hereby constitute and appoint Charles N. Crandle my true and lawful attorney for me and in my name, place and stead, to vote as my proxy at a certain election of directors of the Chicago Steel and Iron Company, to be held at the office of the company on the day of 190 , according to the number of votes I should be entitled to vote if personally present.*

***In Witness Whereof** I have hereunto set my hand, in the City of Chicago, State of Illinois, this 15th day of August, 1901.*

EDWARD O. FOLSOM.

Signed and delivered in the presence of
M. M. LINK.

FORM OF PROXY.

504. To Make Contracts.—To make contracts is the real object of most private corporations, and so patent is it that it seems hardly necessary to refer to it as an incidental power.

A corporation may borrow money and may issue notes, bills and acceptances for the purposes of their business, but they have no authority to endorse or guarantee for accommodation. It may mortgage its real estate and personal property. It cannot make loans of money unless its regular business involves loaning, but if it does loan money the borrower must return it.

A secured a judgment against B in a justice court. B took an appeal to a higher court and in doing so was required to give a bond with a surety. C, a corporation, signed the bond as surety. It was decided that an ordinary corporation could not bind itself as a surety as it was not in the scope of its charter. *181 Ill. 44. 11 Wis. 306. 70 Ia. 541.*

505. Torts.—It is now the settled rule that a corporation is liable for the acts of its agents in the course of its business, and of their employment, the same as if it were an individual. (See sec. 435.)

Corporations have been held liable for assault and battery committed by their agents in executing the rules of the corporation; for trespass; for malicious prosecution and for conspiracy. A corporation may even be indicted, but of course cannot be imprisoned, though its officers may be.

506. Name of a Corporation.—A corporation, like all persons, must have some means of identification. For this purpose a name is chosen, and it is by this name that it transacts corporate business. The right of a corporation to the exclusive use of its chosen name is generally recognized by statute, but it is usually protected by the courts independent of statute. The corporation has neither the right nor the power of itself to change the corporate name, but it may do so by the consent of the authority granting the charter. There is little restriction upon the choice of a name for a corporation, but it is sometimes prescribed by statute that it shall begin with "The" and end with "Company," "Corporation," or other synonomous term. This is the law in Colorado and Ohio, and perhaps other states.

507. By What Law a Corporation is Governed.—The general rule is that the existence of a foreign corporation is recognized for all purposes and in all respects, except those specially prohibited by the domestic law. It may sue in any state where it has rights to defend, and it may also carry on its business anywhere, but it cannot move from the state where created to another, although it may maintain offices in each. Its property is subject to the laws of the state where it exists.

508. As Trustees.—It was formerly supposed that a corporation could not act as a trustee, but it is now common for them to organize for this very purpose. They also act as guardians of property, executors, administrators, etc., and indeed there is often economy in their doing so, for having many clients, they can offer the superior service of trained agents at a minimum cost. They are also organized to guarantee the title of realty to intending purchasers.

509. Liabilities of a Stockholder.—One thing that has tended to popularize corporations, more than any other, is that at common law the stockholders are not liable for the corporate debts. If the corporation should become bankrupt, the stockholders may lose their stock, and if they have not fully paid for it they are liable for

the unpaid amount, for the creditors are entitled to this full protection. Creditors cannot resort to it as a trust fund, however, until the corporate assets have been exhausted. In some states by statute the stockholder is liable for double the amount of his stock. This is also the liability of a stockholder in a National Bank. In still other states the stockholder is liable the same as a partner. The corporation has a lien upon a stockholder's stock for debts due the company by the stockholder. This lien may arise by charter, by statute or by by-law.

510. Rights of Stockholders.—The stockholder has the right at common law to examine or inspect, at any reasonable time, the books and records of the corporation. This right is also conferred in many states by statute. He has the right to compel a director guilty of negligence to make good the loss occasioned thereby to the corporation. He also has the right to attend meetings of the stockholders and to participate therein.

511. Transfer of Stock.—To transfer a share of stock there are generally two steps to be taken. First, the assignment of the certificate to the transferee, and second, the perfecting of that assignment by surrendering the certificate to the corporation and obtaining an entry on the transfer books of the change of ownership. Usually on the back of the certificate is printed a blank assignment, which is filled out by the transferrer, giving the proper officer of the corporation power of attorney to transfer the ownership of the stock on the books of the company to the transferee named. This method does not require the presence of the transferrer, and is much used for this reason. The old certificate may be taken up, canceled, and a new one issued in its stead. Sometimes the assignment mentioned above is filled out, but the name of the transferee is omitted; by this means the certificate may pass from hand to hand by delivery, and has led some to consider it as a quasi negotiable paper.

512. Dissolution of Corporation.—A corporation may be dissolved by the expiration of the time for which it was created; by act of the legislature; by surrendering its charter, or by forfeiture of its franchise.

REVIEW QUESTIONS.

1. Define a corporation. 2. Is any authority necessary to the formation of a corporation, and if so what is the source of that authority? 3. How are corporations divided? 4. Are there any sole corporations in the country? 5. What is a public corporation? 6. What is a quasi corporation? 7. In what ways may a corporation be created? 8. What is meant by a special charter? 9. How are corporations now generally created? 10. Why is this the case? 11. Does congress ever create corporations by special act? 12. Who is a corporator? 13. Who is a subscriber? 14. Define capital stock. 15. What is the usual procedure in the organization of a corporation? 16. What is a by-law and who makes it? 17. What is a charter? 18. How is stock issued? 19. What kind of property is stock? 20. Name and define the different kinds of stock. 21. What is meant by "watering stock"? 22. What are the implied powers of a corporation? 23. What is meant by "succession"? 24. Why do corporations have a common seal? 25. How are officers elected? 26. Explain the manner of voting. 27. What is meant by a system of "cumulative voting"? 28. Is it in vogue in your State? 29. Does the right to vote by proxy exist at common law? 30. How far is a corporation liable for the torts of its agents? 31. What contracts may a corporation make? 32. By what law is a corporation governed? 33. What are the liabilities of a stockholder? 34. What are the rights of a stockholder? 35. How is stock transferred? 36. How may a corporation be dissolved? 37. Through whom does a corporation do business?

JOINT STOCK COMPANIES.

CHAPTER XLII.

513. Explanation.—Joint stock companies occupy a kind of middle ground between a partnership on the one side and a corporation on the other. In many respects they resemble each. In England they have been numerous, and formerly in this country they were much more numerous than now. The ease with which corporations can be organized under the general incorporation acts, which have been passed by the various states, has had the effect of increasing the number of corporations at the expense of the number of joint stock companies.

514. How Formed.—A joint stock company being a voluntary association, it can be formed for any lawful purpose.[1] It is organized in much the same manner as a partnership, but is preferable to a partnership when a large number of partners are interested, for the business is conducted by the officers or agents in the same manner as in a corporation. Those who are to compose the membership of a joint stock company enter into articles of agreement as to how the business shall be conducted. This agreement is at once the charter and by-laws of the association, and by it the powers and duties of the members are to be judged, their liabilities being left to the law itself.

515. What Articles Should Contain.—The articles provide for the manner of forming the company; for the amount of the capital stock; for the number and par value of the shares; for the manner of transferring the shares; for the number and kinds of officers and the manner of their appointment; for regular meetings of the stockholders and the manner of calling special meetings; for the manner of voting

[1] In Illinois and Louisiana they have been held as illegal at common law. But this is certainly not the weight of authority.

at such meetings, and in general for the entire management of the association.

Sometimes the articles provide that the property of the association shall be held by a board of trustees, in whose name the business is to be conducted. This is valid at common law, but many states[1] have special statutes expressly specifying the objects for which a trust may be created, and these statutes should always be consulted when involved.

516. By Implication.—A joint stock company may also exist by implication. Where there has been an ineffectual attempt at incorporation the result may be a joint stock company. Thus after the charter of a corporation has expired, if the company still continues to do business, they do so as a joint stock association.

517. Liability of Stockholders. — The stockholders in a joint stock association are liable to its creditors as partners, and the ordinary rules of partnership apply as between themselves, including the right to contribution. A member's subscription may be enforced, as in a corporation.

Under the peculiar statute in New York a member may deal with and sue the company, the same as in a corporation, but it is said that this right does not exist at common law. A member who transfers his stock is liable for precedent debts of the association.

518. Joint Stock Companies Compared with Partnerships and Corporations.—From what has been said it will be seen that in their formation and the liability of members, joint stock companies resemble partnerships, but in their organization, manner of doing business and election of officers, they are like corporations. They also resemble corporations in having the "power of succession." They do not, however, have a common seal.

In voting each member has one vote, regardless of the amount of his investment.

519. How May Sue and be Sued.—A joint stock company cannot sue by common law, as can a corporation by and in its name, but in the name of its members.

520. Dissolution.—On the dissolution of a joint stock company, either by expiration of time or otherwise, the directors or trustees

[1] California, Connecticut, Georgia, Kentucky, Michigan, Minnesota, North Carolina, Pennsylvania.

are bound to convert the property into cash, pay the debts and distribute the remainder. When a certain time is fixed in the articles for the dissolution of the company, it cannot be dissolved at the instance of a member before that time. It may be dissolved by decree of court when the enterprise becomes impracticable.

521. Social and Benevolent Clubs.—A joint stock association should be distinguished also from social and benevolent clubs, which do not have a capital stock.

INSURANCE.

CHAPTER XLIII.

522. The Contract of insurance is one by which the insurance company agrees for a consideration to reimburse the other party to the contract, or some one they may agree upon, for a certain loss, or in case of a certain contingency. It is a contract every year becoming more popular. It enables the business man to count with certainty in advance upon the cost of certain risks which are incidental to every business undertaking. By it also a man of frugal means is enabled to make suitable provision for his family in case of his death or injury. Almost every year sees some new risk against which insurance can be taken, but these may all be classified under the following general heads: (1) Fire; (2) Life; (3) Casualty; (4) Marine.

FIRE INSURANCE.

523. Parties and Terms.—The business is nearly always done by incorporated companies, organized for that purpose. The company is called the *insurer*, the owner of the property in question is called the *insured*. The contract of insurance is the *policy*, and the consideration is called the *premium*.

524. Companies.—There are two kinds of companies, stock and mutual. The stock company is usually, if not always, a corporation which pledges its whole capital and receipts to the payment of losses. This kind of company takes the contract for a certain premium, which is agreed upon in advance.

In a mutual company the amount of premium to be paid depends on the amount of losses which the company may sustain for the period. A small cash payment is usually required, and a conditional note is taken for a much larger sum. If the losses of the company exceed a certain amount, then the makers of the notes are called upon pro rata. While the insured is a member of the com-

pany, yet he cannot be called upon for more than the amount of his note. Mutual companies usually have no capital, or at least only a small one, the security of the insured being its receipts. Mutual companies are not now so common in fire insurance as formerly, but they are still often found in the country districts.

525. Insurable Interest.—The contract of insurance is a wagering contract. The company, for a small sum, takes its chances on the destruction of the property. If it sustains a loss on one risk it will make it up on the many others on which no loss occurs. The loss is sure to occur, and some one must sustain it, for this reason the law upholds contracts of insurance and favors them. It permits the insured to provide against this risk of loss on account of the beneficial effects which follow. It does, however, require that some loss shall occur to the insured in case of fire. It is against this loss that insurance may be taken. The party insured, then, must have some interest in the property in question, *not only at the time of the insurance, but at the time of the loss.*

526. A Divided Interest.—It is not necessary that one person own the entire property in order to have an insurable interest. Different persons may have different and distinct interests in the same property, and the law permits each to protect his interest by means of insurance. A familiar instance of this is the case of a mortgagor and mortgagee. Thus commission merchants, having an interest in property in their possession to the extent of their commissions may insure, as may also the owner, and it has been held that each can insure to the full value of the property. It has also been held by the Supreme Court of the United States that a party occupying premises under an agreement to purchase, had an insurable interest up to the value of the property, even though the real owner also had it insured. The general rule is that a person cannot insure his property for its full value. This is not a rule of law, but of the companies.

527. Agents.—The company does its business through agents, appointed in the several localities where it is proposed to do business. They act for the company and make reports to the head office of the facts connected with each risk. These agents are governed in all respects by the law of agency, and notice to them is notice to the company which they represent. They are, however, special agents.

528. Board Companies.—Most companies are members of the board of underwriters. This is an association of companies formed for their mutual benefit. A committee is chosen and sent to each town or city where these companies propose to do business. They organize the local agents into a local board of underwriters, and view and inspect the entire business portion of the place. They note for what purpose each building is occupied, the structure of the building, whether of brick, stone or wood, the kind of roof, the "exposures," that is, its proximity to other buildings, in fact they observe all matters that tend to increase or decrease the risk from fire. They then fix from these facts the rate of premium that each building should pay, and the rate that the contents should pay. This is called the "board rate," and no agent of a board company is permitted to take it for less.

529. The Policy.—This is the contract between the insured and the insurer, and as each company always uses its own printed form, which differs somewhat from the others, it should always be consulted in case of dispute. It usually contains a minute description of the premises or property insured, the amount insured, the premium paid, or to be paid, and the time for which the insurance is to continue. The latter is exact to an hour. Most policies expire at twelve o'clock, noon. The object for which the premises are to be used should always be stated, for on it depends the degree of risk.

530. Conditions in the Policy.—Policies usually contain conditions, which are expressly made a part of the instrument. Their fulfillment is in such cases a condition precedent to a right of recovery. One of the common conditions is that the insured shall not alter the premises so as to increase the risk. He cannot, except with the consent of the company, erect other buildings within a certain limit of the insured premises, without rendering his policy void.

531. Another Condition often inserted in policies, is that the insured must notify the company in case he procure additional insurance on the property. The object of this is to prevent the over insuring of the property, and thus put a temptation in the way of the insured for its destruction. Sometimes a provision is inserted in the first policy as follows: "$—— additional insurance permitted."

An interesting and important question arises as to whether the

insured has any remedy on either policy when he procures two policies, each containing the clause against further insurance, and neither company has knowledge of the other policy. It was decided in Massachusetts that the second policy being void, his right on the first was perfect.

532. The Risk.—The risk is the danger from loss by the particular damage insured against. Sometimes policies against loss by fire also contain a provision including loss by lightning as well as by fire. The actual loss to the insured is the criterion or true measure of damage. By this is meant the actual value of the property at the time of loss. The loss under the peculiar circumstances of the case may occasion the insured damage and inconvenience far beyond its actual value, still the actual value remains the true measure. Without a provision in the policy to the contrary, loss by lightning is not covered, unless ignition actually takes place. It includes losses resulting from water thrown on to put out or control the fire. The negligence of the owner cannot be used as a defense against his right of recovery, unless there be also fraud.

CHAPTER XLIV.

FIRE INSURANCE—CONTINUED.

533. Abandonment of Fire Insurance.—There is no such thing in fire insurance as an abandonment of the salvage to the company, in case of a partial loss, and then claiming the whole insurance. This right exists only in marine insurance.

534. Amount Insured.—The amount stated in the policy is not the amount the company agrees to pay in case of loss, but the maximum amount for which they are willing to become liable. The loss, though total, may be but a small proportion of the amount stated in the policy. The amount stated in the policy is, however, the basis for the computation of the premium, which is a certain per cent of it.

A insures his building, valued at $5,000, for $3,000. A partial loss occurs, amounting to $2,000. The loss is said to be fully covered, and he will get the full $2,000. If the loss had been $4,000 he would only get $3,000. So also if it had been total he would only receive $3,000.

When a partial loss occurs, and the company pays it, it is then only liable for the remainder of its policy. Thus, in the above case, if the loss had been $1,000, the company would then only be liable for $2,000 additional. If the insured wishes the full $3,000 of insurance, he should pay the additional premium.

535. Insurance in Several Companies.—Insurance companies as a rule prefer many and small risks to few and large ones. Then, in case of loss, their loss is not so much as to affect them, or to cause uneasiness on the part of those who hold their policies. For this reason one who has a large property which he wishes to insure, must do so in several companies. In this case the companies will demand that the written portion of the different policies shall all be alike. This is to make a settlement in case of loss an easy matter. They thus each insure the identical property, and they stand as co-sureties for the loss, each being liable up to the amount mentioned in its policy. If the loss be total each is liable for the full amount of its policy, but if the loss be partial each pays that proportion of the loss which the amount of its policy bears to the whole amount of insurance.

A has a property which he insures in the following companies: Ætna, $2,000; Hartford, $3,000; Girard, $4,000, and Queen, $3,000. There is a loss of $1,800; this being 15 per cent of the total insurance, each company must pay 15 per cent of the amount of its policy, which will just make the loss good.

A would then have to make collection from four companies. Instead of this he can collect the whole amount from any one of them, and it can in turn compel the others to contribute their shares. This is no more than the right of contribution mentioned in sec. 258, which exists among all joint debtors. To prevent this throwing of the burden of collection entirely upon the companies, many have inserted a provision in their policies that only their pro rata can be collected from them.

536. Adjustment of Loss.—The policy usually prescribes what proceedings must take place in the event of loss. It usually specifies that notice must be immediately communicated to the company, stating the cause and extent of the loss, the same to be verified under oath. These provisions have been held as proper, and imposing no unnecessary burden on the insured.

In large cities there are parties whose business it is to let their services to those who have suffered a loss which is covered by insurance. Being trained "adjusters" they claim to be able to make a

better adjustment in case of partial loss than the insured, who is unfamiliar with such matters. They are the agents of the insured. When the amount of loss is not in dispute their services are of course not required.

In case of a total loss the insured collects only the value of the property irrespective of the amount of the policy, but some States[1] have statutes compelling full payment of the amount of the policy.

537. Assignment of Policy.—The contract of insurance is a personal one, and cannot pass to another without the consent of the insurer. After a loss occurs there is a vested right in the insured to the indemnity, which right is assignable *without* the consent of the insurers. The policies very commonly provide that an assignment of either the property or policy will avoid it. It has been previously observed that the insurable interest must exist throughout the life of the policy. (See sec. 525.) When one transfers the property he is not damaged by its loss, hence the insurer is not liable.

When one purchases property on which there is insurance, the policy should be immediately assigned, and the consent of the company obtained, or new insurance should be procured if it is expected to keep the property insured. When property is sold on which there is insurance, there is no implied contract that the policy shall be assigned as a part of the consideration. The seller may cancel the policy and take its surrender value.

A has a house on which there is a policy for $5,000, having two years yet to run. He sells the house to B, who pays the purchase price and takes possession. Nothing is said about the insurance, and in ten days after the transfer the house burns. The company is not liable to either.

Death is not such an alienation of the property as to render the policy void; neither is a mortgage of the premises a sale of the property in this sense, but the insurance companies are careful to provide against cases of the kind.

538. Surrender of Policies.—The ordinary policy provides that it may be canceled at the option of either party. When canceled by the company they retain only so much of the premium as has been earned, but if canceled by the insured, then a larger per cent of the premium is retained, and the remainder returned. This is to prevent one who wishes a short term policy from taking a long term at the cheaper rate and then canceling the policy at the end of the short term.

[1] Ohio, Massachusetts, Nebraska, Missouri. See *N. E. Rep. 962.*

539. Representations.—Often there is a written application made for insurance. A statement made either orally or in this application, if not a part of the policy, is called a representation. If these representations are material to the risk, and are false and fraudulent, the policy will be void. A concealment is the converse of a representation, but if the fact is material to the risk it should be communicated to the insurer.

540. Warranties.—A warranty differs from a representation in that the former is made a part of the contract. It operates as a condition precedent, and if broken there is no contract.

541. Insurance by a Mortgagee.—It has been held in a number of cases in Massachusetts, that when a mortgagee takes out a policy of insurance in his own name, paying the premium himself, and a loss occurs before his debt is paid, he can recover for the total loss and still have a right to recover his whole debt from the mortgagor. If the debt has been paid, he of course sustains no loss, and the company is not liable.

The case would also be different if the policy be taken by the mortgagor for the benefit of the mortgagee, as his interest may appear.

CHAPTER XLV.

LIFE INSURANCE.

542. Importance.—Life insurance has become very popular in this country. It is said that a certain prominent business man carries nearly a million dollars of insurance on his life. Not only is it popular among the rich, but among other classes as well. It is taken not alone for the protection of those dependent on the insured, but as an investment as well.

543. Definition.—Life insurance is a contract whereby, for a consideration, one party agrees to pay a certain sum of money to another when a certain person dies or reaches a certain age.

There are three parties to the contract: The *insurer*, the one whose life is insured, often called the *life-insured*, and the person to

whom the money is to be paid, called the *beneficiary*. Sometimes a person takes out insurance on his own life, and has it payable to himself or to his "estate." In the latter case it is payable to his legal representatives. In most states the creditors of the insured have no claim upon the insurance that is payable to any one except to the estate of the insured.

544. Insurable Interest.—There must be an insurable interest in the life insured to effect a valid insurance. One of course has such an interest in his own life, and a creditor has such an interest in the life of his debtor as to enable him to insure it upon his own account, but the interest does not extend beyond the amount of the debt. A partner may insure the life of a co-partner. Every interest one may have in the life of another is not insurable, it must be a direct pecuniary interest. A child, if dependent on a parent for support and education, has such an interest, and a parent, if dependent on a child for support, is entitled to insure it. This insurable interest differs from that in fire insurance, in that it is sufficient if this interest exists at the inception of the policy, while in fire insurance, as we have observed, it must continue throughout the life of the policy.

If the life of a debtor is insured by his creditor, and the debtor dies, the question arises whether, after the receipt of the insurance, the creditor can still claim the amount of his debt. It is a well settled rule that he can. If the policy had been taken out by the debtor, and made payable to the creditor, as collateral, the rule would of course be different.

545. The Beneficiary.—When one takes a policy on his own life, and makes it payable to another, that one, though it may be unknown to him, acquires such an interest in the policy that it cannot be controlled or changed without his consent.

546. Application.—A formal, written application is usually made for a policy. This application, among other things, gives the name, age and residence of the life-insured. The company has an examining physician, who makes a medical examination of the person. Not only is a personal examination made, but answers must be made to a long list of questions affecting directly or indirectly the risk. These answers are taken in writing, and on them, as well as on the physician's examination, the company bases its acceptance of the risk.

These questions relate to the habits of the party to be insured, also to the kinds of disease with which the party has already been afflicted, and to the longevity of his ancestors and near relatives. The answers should be made in perfect good faith, for they become warranties, and on their correctness depends the validity of the policy. They are usually incorporated in the policy and become a part of it.

547. The Policy.—As in fire insurance, the policy is the contract, and reference must always be made to it for its provisions. The forms and provisions of different companies vary somewhat. These policies quite frequently contain a provision that the party insured must not remove to or travel in certain regions where the death rate is high, or engage in certain extra hazardous undertakings, under penalty of forfeiture of insurance. The policy also contains the amount of premium paid or to be paid, also the amount of insurance, to whom payable, and the name of the party insured.

548. Assignment.—Policies usually contain provisions in reference to their assignment, and when they do the provisions are binding. It is no uncommon thing for policies to be assigned, to give security to a creditor. Notice and assent are usually required to give effect to an assignment. A delivery for the purpose of assignment has been held good as such, without any writing. But there must always be a delivery. The better method is to endorse the policy and then secure the assent of the company.

549. The Premium.—This is the consideration paid, or to be paid, for the insurance. It may be a gross sum, or it may be so much annually, semi-annually or quarterly. In mutual companies the premium depends upon the losses, an assessment being made on the members in proportion to their insurance. The rate of premium depends upon the age of the person insured. Great care should be used to pay the premium promptly when due, for many policies are avoided by negligence in this regard.

550. Kinds of Companies.—There are, as in fire insurance, a number of different kinds of companies. The business is almost, if not quite, universally done by corporations. Fraternal organizations often include an insurance feature. These organizations are usually mutual, and have no capital stock or security to the policy holders beyond the moral certainty that the members will pay their assess-

ments. In a mutual company a policy holder may withdraw at any time by failing to pay his assessment.

551. Plans of Insurance.—There are innumerable plans for insurance, plans that differ in the details, but it is our purpose to mention only some of the most common. In the first place a policy may be participating or non-participating. In a participating policy the holder shares in the profits of the company derived from certain sources. A prominent company, in a recent report, states these sources in its case as follows: "The dividend surplus arises *first*, from the difference between four per cent interest on our invested assets and the higher rate received; *second*, from the difference between the death losses sustained during the year and the expected losses shown by the tables; *third*, by the difference between the margin which is added to the net premium to meet the expenses of conducting the business and the actual expenses incurred." This profit may, at the option of the holder, be taken to reduce the annual premium, or it may be retained by the company as premium for the purchase of additional insurance, or if the policy be paid up it may be received in cash annually. A non-participating policy has none of these features.

552. Plans Continued.—An ordinary life policy is one in which the premium is paid annually, or otherwise, during life, and the insurance is payable at death. There are also policies wherein the premium is to be paid for a certain number of years only, and the insurance is payable at death. If the premium be paid for the number of years specified the holder is then said to have a "paid up policy." There will be nothing more to pay on it, and if it be a participating policy the holder may receive annually a cash dividend on it. This is one of the policies that have a commercial value.

553. Endowment.—When investment is a prominent feature of the plan, an endowment policy is usually taken. By this plan the premium is to be paid annually for a certain number of years, and the insurance is to be paid at the end of a certain number of years, or at prior death. By this plan the party insured has hopes of receiving the insurance himself. The plan is sometimes adopted when it is expected that a fund will be required at a certain time for a certain purpose, such as the education of a child.

554. Non-Forfeitable Policy.—Most limited premium policies are by their terms non-forfeitable after the payment of a certain number of premiums. That is, if a certain number of premiums have been paid, and the holder then fails to pay more, he may have a paid up policy for the amount for which he has paid.

555. Surrender Value.—Most companies give the option to the holder, at maturity of policy, of taking either a paid up policy or a gross sum in cash. Some also agree to purchase for cash the policy at its then valuation, at any time during its life. This is called its surrender value. This value will depend upon the number and amount of premiums paid.

Table of Rates of Premium on Policy of $1,000.

	LIFE POLICIES.				ENDOWMENT POLICIES.				
Age.	Annual Premium.	10 Annual Payments.	15 Annual Payments.	20 Annual Payments.	10-Year Endowment.	15-Year Endowment.	20-Year Endowment.	25-Year Endowment.	30-Year Endowment.
25	$20 50	$43 50	$33 10	$28 10	$105 90	$67 40	$48 70	$38 00	$31 40
26	21 00	44 30	33 80	28 60	106 00	67 50	48 90	38 20	31 60
27	21 50	45 20	34 40	29 20	106 10	67 60	49 00	38 40	31 80
28	22 10	46 10	35 10	29 80	106 30	67 80	49 20	38 60	32 00
29	22 70	47 00	35 90	30 50	106 40	68 00	49 40	38 80	32 30
30	23 30	48 00	36 60	31 10	106 60	68 20	49 60	39 10	32 60
31	24 00	49 10	37 40	31 80	106 80	68 30	49 80	39 30	32 90
32	24 70	50 10	38 30	32 60	107 00	68 60	50 10	39 60	33 20
33	25 50	51 20	39 10	33 30	107 20	68 80	50 30	39 90	33 60
34	26 30	52 40	40 00	34 10	107 40	69 00	50 60	40 30	34 00
35	27 10	53 60	41 00	35 00	107 60	69 30	50 90	40 60	34 50
36	28 00	54 80	42 00	35 80	107 80	69 60	51 30	41 10	35 00
37	29 00	56 20	43 00	36 80	108 10	69 90	51 70	41 50	35 60
38	30 00	57 50	44 10	37 70	108 40	70 20	52 10	42 00	36 20
39	31 10	59 00	45 30	38 80	108 70	70 60	52 50	42 60	36 80
40	32 20	60 40	46 50	39 80	109 10	71 00	53 00	43 20	37 60
41	33 40	62 00	47 70	41 00	109 40	71 50	53 60	43 90	38 40
42	34 70	63 60	49 00	42 20	109 80	72 00	54 20	44 60	39 30
43	36 10	65 30	50 40	43 50	110 30	72 50	54 80	45 40	40 30
44	37 50	67 10	51 90	44 80	110 80	73 10	55 60	46 30	41 30
45	39 10	69 00	53 40	46 20	111 30	73 80	56 40	47 30	42 50
46	40 70	70 90	55 10	47 80	112 00	74 60	57 30	48 40	43 80
47	42 50	72 90	56 80	49 40	112 60	75 40	58 30	49 60	45 20
48	44 40	75 10	58 60	51 10	113 40	76 30	59 40	51 00	46 80
49	46 40	77 30	60 50	52 90	114 20	77 30	60 70	52 40	48 50
50	48 50	79 60	62 50	54 80	115 10	78 40	62 00	54 00	50 30

The above are the published rates of a prominent company.

556. Manner of Death.—Most policies include a provision that death caused by suicide or duel shall make the policy void. The courts are much inclined to nullify the provision in reference to suicide, and hold the company liable. Death by the hands of justice discharges the insurer.

CHAPTER XLVI.

CASUALTY INSURANCE.

557. Introduction.—The liability to loss through unforseen casualties is incidental to every business undertaking. The careful business man takes it into consideration in estimating the probable cost of every venture. The results may show that he either over or under estimated its effect. It is not strange, then, that companies should be organized for the purpose of guaranteeing indemnity against almost all kinds of accidents. By this means the business man is enabled to foretell exactly the cost or expense of this element. It is but fair to say that this branch of insurance is of comparatively recent origin, and hence the law pertaining to it cannot be said to be fully developed. In general there is an evident intention to follow the rules of law already formed in the older branches of insurance wherever they are applicable.

558. Accident Insurance.—This is a personal insurance against all accidents happening to the insured. As in life insurance the business is conducted on two plans, mutual and level premium. When a definite premium is charged, it is based on the hazards of the business in which the insured is engaged, and not on the age. The different kinds of business are classified according to the risk which experience shows attends them. The premium also depends of course on the amount of indemnity assured. The amount of the insurance is always stated in the policy, which usually provides that a certain amount will be paid in case of death by accident; a less amount in case of loss of limbs, (hands or feet), and a still smaller amount for loss of one limb, (hand or foot). It also provides for a certain weekly indemnity while disabled.

559. Employer's Liability.—Every employer knows that a suit for damages not infrequently follows an accident happening to any of his workmen. Even if he is not legally liable, the suit is sure to cause him more or less expense, anxiety and worry. It is against this liability that an employer is now able to insure himself. It must be understood that neither the employer nor employee profit directly by the insurance. The agreement is to pay only in case the insured is liable to pay.

A is a builder and contractor, and employs a large number of men annually. The business is more or less hazardous, and not a year passes but several workmen are injured in the course of their employment. He takes out an Employer's Liability policy to protect himself against any liability by reason of his negligence in not providing proper machinery, and against the negligence of any of his workmen, not engaged in the same line of business as the injured. (See secs. 431 and 432.)

The premium is based on the amount of his annual pay roll, also on the gross amount for which he is insured, and the hazards of the business in which he is engaged. The policy usually provides that the company will not be responsible for any one accident beyond a certain amount, and beyond a certain larger amount for the whole period of the policy.

When an accident occurs the insured notifies the company, who immediately investigate all the circumstances of the case, and if they deem the employer liable, the claim is settled. If suit is brought against him they take full charge thereof, by furnishing counsel and collecting evidence. To protect itself the company has the right to inspect the machinery of the insured at all times, and may cancel the risk at any time by refunding the amount of unearned premium. The policy usually contains a provision that the company shall have the right of subrogation.

560. Guaranty of Title.—Companies are now organized for the purpose of guaranteeing the validity of one's title to real estate. The company has in its regular employment trained attorneys, who are particularly skilled in real estate law. When one sells realty he will usually be required to give an abstract of title, showing a clear and indefeasible title in him. Instead of this, he may make application for a Guaranty of Title policy to run in favor of the purchaser. The company, by its attorneys, thoroughly investigates the records,

and if the report is satisfactory a policy is issued. The premium depends upon the amount of insurance, and also on the defects in the title, if any.

In case the title is attacked, the company supplies counsel and takes charge of the defense, or settles the claim, as it may deem best. Such a policy cannot be assigned when the property is sold, so as to carry its benefits to the purchaser, for the transfer of property introduces a new element into the title, an element not considered at the inception of the policy.

561. Plate Glass.—It is a well known fact that large pieces of plate glass are expensive, and that they are usually so placed as to be exposed to constant risk of breakage. It is now the general custom to insure plate glass against this risk, and especially is this true when it is placed in a business house abutting the street, and on the ground floor. Large expensive mirrors are also frequently insured. The premium charged is a certain per cent of the manufacturer's list price on the glass. In case of loss the company usually replaces the glass instead of paying the cash, for it can do so much cheaper than can the insured.

562. Steam Boilers.—Steam boiler insurance is against all immediate loss or damage caused by the explosion, collapse or rupture of the boiler. It covers damages to the boiler itself, and also to other property of the insured. It saves the insurer harmless from any liability from damages to the property or person of other persons, if such liability was the result of the explosion. The insurance against the injury to the person is limited to a certain gross amount, and also to a certain amount per week in case the injury is not fatal. It does not cover a loss by fire even though it be caused by the explosion. The insured, in case of an accident covered by the policy, agrees to give immediate notice to the company, in writing. The company may investigate the accident, and either make settlement for the loss, or defend the case by its attorneys in case an action is brought, as it may elect. As in all policies, the company will not in any case be liable beyond a certain amount.

The boilers are frequently tested by the inspectors of the company, and if defects are found, which are not immediately corrected, the policy may be suspended. The amount of premium is largely a matter of special contract, depending somewhat upon the cost of inspection, the number of boilers together, their condition, etc.

563. Elevator.—Policies are now written granting insurance to the owner or lessee of an elevator. It usually only covers loss for accidents to the car itself and liability for injury to the persons of others.

564. Rents.—The owner of a building which is leased, may be deprived of his rents because of some accident which has made the building uninhabitable. A fire may have made extensive repairs, if not a new building, necessary. A fire policy would cover the cost of the repairs, but would not reimburse him for the loss of rents. To cover this a rent policy may be taken out. The premiums are based on the rent roll, and the amount of the policy.

565. Guaranty of Honesty.—Persons who are about to accept a position of trust, are often required to give bond that they will faithfully perform the duties assigned to them, and especially that they will make true return of any and all moneys that may pass through their hands while in such employment. Their record may be good, and still they may have no friends able and willing to guaranty their honesty. Bonds or policies of this kind are now a common feature of this branch of insurance. Administrators, executors and guardians often make use of such bonds to guaranty to the court the faithful discharge of their duties. The premium charged is based on the amount of the bond, and on the opportunities there may be for dishonesty.

566. Loss By Thefts.—One of the latest features of this branch of insurance is a policy securing indemnity against burglars, or thieves of all kinds.

REVIEW QUESTIONS.

1. Name the parties to a contract for fire insurance. 2. Describe the different plans of insurance. 3. What is a mutual company? 4. Which is the most common plan? 5. Define an insurable interest. 6. Can two or more persons secure insurance on the same piece of property? 7. What is a board company? 8. Describe how the rates are fixed. 9. What is a policy? 10. What can you say of conditions in the policy? 11. What is meant by the risk? 12. Is loss by lightning covered by the ordinary fire policy? 13. What is meant by "abandonment"? 14. Where does it obtain? 15. On what is the premium based? 16. How are losses usually adjusted? 17. In case several companies have policies on the same property, and there is a loss, how do they adjust it? 18. When and how can a policy be assigned? 19. What is meant by surrendering a policy? 20. What is a representation, and what is its effect? 21. What is a warranty, and what is its effect? 22. Can a mortgagee, who has insured his interest, collect the insurance in case of loss, and also the debt? 23. For what purpose is life insurance taken? 24. Define life insurance. 25. Name the parties. 26. What is an insurable interest? 27. How does it differ from an insurable interest in fire insurance? 28. Can one who has taken a policy in favor of another change it without the consent of that other? 29. What does an application for life insurance usually contain? 30. How and when can the policy be assigned? 31. On what is the premium based? 32. How may the premium be paid? 33. Explain the methods of a mutual company. 34. What other kind of company is there? 35. What is a participating policy? 36. What are the sources of profit that is divided among the policy holders? 37. What is an endowment? 38. Are policies usually forfeitable? 39. Define surrender value. 40. Is a company liable for a death by suicide? 41. What can you say of the growth of casualty insurance? 42. Explain accident insurance. 43. On what is the premium based? 44. Explain employer's liability insurance. 45. On what is the premium based? 46. Explain guaranty of title. 47. On what is the premium based? 48. Explain plate glass insurance. 49. Explain steam boiler insurance. 50. What does the insurance cover? 51. What does elevator insurance cover? 52. What does rent insurance cover? 53. Explain guaranty of honesty insurance.

REAL ESTATE.

CHAPTER XLVII.

567. Definition.—Real property consists of such things as are permanent, fixed and immovable. It includes the minerals that are beneath the surface of the earth, and the water which is upon its surface, as well as whatever of a permanent nature is attached to the earth, such as buildings.

568. Source of our Law.—When we were a dependency of Great Britain we, of course, adopted her system of real estate tenures, so far as they were applicable to the conditions existing here. This formed the basis of our real estate laws, and as there is less disposition to change laws in reference to real estate than in any other branch of the law, this system still continues in the main the law of the land. For this reason, in cases of dispute, the old English decisions are still quoted in explanation or interpretation of our laws.

569. The Feudal System.—In order to understand our real estate law, it must be constantly borne in mind that it was not the result of any one enactment or enactments, but was the growth of decisions for centuries. Much of it originated at a time when personal property was deemed of more importance than real, and when war occupied no small portion of the time of the individual. The feudal system is said to have originated with the Vandals, and was carried with them when they overran Europe, at the decline of the Roman Empire. It was implanted in their colonies as a political measure, for it was deemed the most likely means of preserving their new acquisitions. To this end large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels to the inferior officers and most deserving soldiers. These allotments were called *feuds* or *fees*, which in their language meant a conditional stipend, or reward. The condition annexed to them was that the possessor should do service both

at home and in the wars to him by whom they were given; for this purpose he took the oath of fealty. It can be thus seen that each individual held his property only so long as he remained loyal. This gave to these conquerors such military power that the other nations were obliged to adopt the same plan in self defense, and it finally became the established rule throughout the western world. The system was introduced into England by William the Conqueror, who rewarded his followers with extensive possessions.

In this country the title to all lands is deemed to have been originally derived, since the Revolution, from either the State or the United States. But the title is absolute or unconditional except as to the right of eminent domain.

570. Estates.—An estate is the nature and extent of interest which a person has in real property. There are many different kinds of estates in reference to their nature as well as to their extent, but only the most important ones will be here considered:

- **I.** As to Length.
  - 1. Inheritable.
    - *a.* Fee Simple.
    - *b.* Fee Tail.
  - 2. Non-Inheritable.
    - *a.* Life.
      - Dower.
      - Curtesy.
    - *b.* For Years.
- II. As to Time of Enjoyment.
  - 1. Remainders.
  - 2. Reversions.
- III. As to Number of Owners.[1]
  - 1. In Severalty.
  - 2. Joint Tenancy.
  - 3. Tenancy in Common.

571. Fee Simple.—This is the largest estate possible to be had in property. It is the absolute title, subject, as we have said, only to the right of eminent domain. It is defined as an estate of inheritance, descendible absolutely and generally, the meaning of this being that the owner holds it not alone for his own life, but that he owns that future enjoyment which will descend to his heirs according to the rules of descent. This is the estate that is the most common in this country, and all property is so held by some one.

The owner in fee simple may use the property as he may see fit, and he may sell it or dispose of it. Being an estate of inheritance, it will descend at his death to his heirs, unless he otherwise disposes of it by will.

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[1] See Section 21.

572. Fee Tail.—This estate was once very common in England, and was one of the causes, as we shall see, of raising up and perpetuating the aristocracy and landed proprietors. It was one of the first features of the English real estate law to receive the condemnation of the courts and legislatures of this country. It was considered to be inimical to and opposed to our republican institutions. It is an estate of inheritance, but instead of being "descendible absolutely and generally," it is descendible to some particular heirs, exclusive of others. This has the effect of tying up the estate, and preventing its alienation, for it must go to the stipulated heirs at any event, if there are such; and if not, it reverts to the original donor.

A grants by deed a certain piece of realty to B, *and to the heirs of his body.* This is a fee tail, and B has the use and enjoyment of it so long as he may live. At his death it descends to his lineal descendants, to the exclusion of his collateral descendants. If there be no lineal descendants, then the estate ends and reverts to A.

This is the estate as it existed by common law, but as we have said, it is not at all favored in this country, as it without doubt tends to perpetuate a landed aristocracy.

We have estates tail, however, in a limited sense in most, if not all of the states, but the restraint on alienation usually extends only to those who are in being at the time, and their immediate issue or descendants, after which the estate becomes a fee simple.

573. Life Estate.—A life estate is not an estate of inheritance. It may be held for the life of the holder (called a life tenant), or for the life of another. A life tenant has the right to the full enjoyment of the land, and all its profits, during his estate. While he has the right to cut all necessary wood for fuel and repairs to fences and buildings, yet he is not permitted to commit *waste*, which is the destruction of the estate with respect to houses, wood or soil, to the lasting injury of the inheritance. This may be either actual or permissive, as where the buildings are permitted to go to decay. In the absence of agreement, the tenant should keep the premises in as good repair and condition as he found them, inevitable accidents excepted. He is entitled to emblements. These are the annual crops growing on the land at the termination of the estate. The theory is that the tenant, who could not foresee the death of the person on whose life the estate depended, planted in expectation of reaping. But where the tenant knows when the estate is to expire the emblements go to the next estate.

There are two life estates common in this country, viz: Dower and Curtesy.

574. Dower.—This is the life estate which the wife has in the one-third of all estates of inheritance of which her husband was seized during coverture, to take effect and be enjoyed at his death. The statutes have quite generally enlarged this by giving to her a portion of the personal property as well. It is to release her interest in this estate that a wife should join her husband in a conveyance of realty. The right exists as soon as the property is owned by the husband, but it is said to be inchoate, and does not become active estate until the husband's death. It terminates at her death, when it reverts to the original estate, and descends to the husband's heirs. The courts have always been watchful of this estate, and do not permit it to be barred without the wife's consent. Sometimes the husband leaves her by will a certain estate, or a certain amount of personal property, which is to be in lieu of dower, but she may elect to take the dower or her estate by the will, as she may wish.

575. Estate by Curtesy.—This is the converse of dower. It is the life estate which the husband has in his wife's estates of inheritance of which she was seized during coverture. There is one condition to the vesting or this estate, it is that there shall be issue born alive, and capable of inheriting the estate. It matters not that the child lived but a moment, it is sufficient if it breathed. Curtesy is abolished in some few states, and in some, notably Illinois, the husband has by statute the same interest in his wife's estate that she has in his.

576. Estate For Years.—This is the estate quite generally designated as a lease, but this is but a figure of speech, substituting the name of the instrument by which it is conveyed for the estate itself. An estate for years, no matter how long it may be, is considered as personal property, and has none of the dignity attached to a freehold. One who owns an estate for years is not a freeholder. A freehold estate is any estate of inheritance, or a life estate. A freeholder even in this country is granted some privileges not accorded others. (See chapter 48.)

577. Remainders.—This is another division of estates in reference to the time of enjoyment.

A owning a fee simple in land wills a life estate to his son B, on the termination of which the remainder of the estate is to go to C. C's estate is an estate of *remainder.*

It is defined as an estate limited to take effect and be enjoyed after the termination of some particular estate. B's estate in the above illustration is called the particular estate.

578. Reversion.—A reversion is the residue of an estate remaining in the grantor, or his heirs, to come to his or their possession after the determination of some particular estate granted away.

If A has an estate in fee and grants B an estate for years, or a life estate, he still has a reversion in fee

A landlord's estate is a reversion.

579. How Property Held.—We have already discussed, (sec. 21), how property may be held by one or more owners. In addition to what is there said, it may be added that the naked title to realty may not be held by the owner at all, but by a third person called a *trustee*. In such case all the trustee holds is the naked title and this he holds for the benefit of the real owner, called the beneficiary, to whom he must account for all profits and proceeds. (See sec. 603.)

CHAPTER XLVIII.

REAL ESTATE CONVEYANCES.

580. Introduction.—Having described the various estates common in our country, it will now be proper for us to consider the different instruments of conveyance by means of which these estates are transferred. As the estates themselves had their origin in the feudal system already described so the instruments of conveyance were also taken from this same military age. This fact must be constantly borne in mind in order to account for not only the general form of these instruments but for the phraseology as well.

581. Deeds.—Strictly speaking estates are at common law transferred only by deed which is legally an instrument, signed, sealed and delivered. But it is in the popular sense of this term that it will be used here. They are now much simpler than formerly, owing to statutory regulations. The law of the state where the property is situated applies, and should always be consulted when involved. The following forms of instruments of conveyance are in common use:

1. Warranty Deed, full covenant.
2. Warranty Deed.
3. Warranty Deed, with covenant against grantor.
4. Quit Claim Deed.
5. Release Deed.
6. Mortgage.
7. Trust Deed.
8. Lease.

582. Requisites.—Unless the statute has provided otherwise, a deed should have the following seven requisites:

1. Parties.
2. Consideration.
3. Written (or printed) document.
4. Legal setting forth.
   - *a.* Premises.
   - *b.* Granting Clause.
   - *c.* Description.
   - *d.* Habendum (to have) and Tenendum (to hold) clause.
   - *e.* Condition, or clause of contingency.
   - *f.* Warranties, or covenants.
   - *g.* Conclusion.
5. Signing and Sealing.
6. Acknowledgment.
7. Delivery.

Of the first three requisites it will be unnecessary to speak, for what has already been said of them under contracts, applies equally well here. The one making the conveyance is called the grantor, and the one to whom it is made the grantee. The premises include the names and description of the parties, the recital of the consideration, and any other agreement peculiar to the case.

This Indenture, *Made this 22nd day of August, in the year of our Lord One Thousand Nine Hundred One, between Charles H. Hathaway and Laura Hathaway, his wife, of the City of Chicago, in the County of Cook and State of Illinois, party of the first part, and Martin F. Deale, of the Township of Pella, in the County of Ford, and State of Illinois, party of the second part:*

Witnesseth, *That for and in consideration of the sum of Two Thousand Dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom,* * * * *

It is not necessary that the actual consideration be stated. It is sufficient if it state a valid consideration.

Deeds are of two kinds, *deeds poll*, by which is meant a deed of *one* party to another, and *indentures*. The former begins: "Know all men by these presents," and the latter, "This indenture," etc. These are called indentures because in ancient times there were made as many copies, on one piece of parchment, as there were parties, and in separating them these were cut or indented like the teeth of a saw—hence the deed came to be called an indenture, and is so called to this day.

583. The Granting Clause is the one in which the grantor grants to the grantee. The language used varies in the different kinds of instruments. Thus, in a warranty deed it is usually, "bargain, grant, sell and convey," or any two or more of the terms; in a quit claim it is "bargain, sell, remise and quit claim," and in a lease it is "demise and lease." This clause also contains the words that define the length of the estate granted, or as they are called, "words of inheritance." These are "heirs and assigns." At common law, unless these words are used, showing that the grant is to the grantee and his heirs and assigns, that is, an estate of inheritance, only a life estate will pass, leaving a reversion still in the grantor. The importance of these words cannot be overestimated.

The said party of the first part has granted, bargained, sold remised, released, conveyed, aliened and confirmed, and by these presents does grant, bargain, sell, remise, release, convey, alien and confirm, unto the said party of the second part, and to his heirs and assigns forever, all the following described lot , piece , or parcel of land, situated in the City of Chicago, County of Cook and State of Illinois, and known and described as follows, to-wit:

584. Description.—The description of the property should be clear and unmistakable. To avoid error, the legal description should always be used. The system of rectangular surveying employed in all western states, makes an accurate description a comparatively easy matter. If other forms of description are also employed, care should be used to see that they describe the same property.

The South East quarter (S. E. ¼) of the North West quarter (N. W. ¼) of Section twenty-nine (29), Township thirty-eight North (38 N.) of range fourteen (R. 14) West of the third principal meridian.

585. To Have and to Hold.—The fourth clause in a deed begins with these words. Its purpose was the same as we have described the granting clause to be, and the granting clause being used, this clause is now quite unnecessary. If words of inheritance be omitted

from the granting clause, they may be inserted in this, and the defect will be cured.

Together with all and singular, *The hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim or demand whatsoever, of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances:* ***To Have and to Hold*** *the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.*

586. Condition.—This is a clause inserted when the estate granted is to be defeated on the happening of a certain event. A good example of it is in case of a mortgage, providing that if the debt be paid, then the mortgage to be null and void. (See sec. 596.)

587. Warranties.—By this the grantor, not only for himself, but for his heirs, warrants the grantee or his heirs, secure in the estate granted. If the grantor covenant for his heirs, they are bound to perform it, provided they have assets by descent, but not otherwise. There are four covenants to a full covenant warranty deed. These may be as follows:

And *The said party of the first part, for their heirs, executors and administrators, do covenant, grant, bargain and agree, to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, (1), they are well seized of the premises above conveyed, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in law, in fee simple, and (2), have good right, full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and (3), that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances, of what kind or nature soever; (4), and the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every other person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will* ***Warrant and Forever Defend.***

In case the grantee or his assigns are ousted they may fall back on the grantor or his heirs and demand damages for the loss. In most of the States the measure of damages is the money paid for it with interest (deducting rents and profits) and the legal cost of defending the suit.

An ordinary warranty deed contains only the last two covenants. It will be readily seen that these covenants are not broken until the

grantee or his assigns are actually evicted, but the first two covenants are broken if at all immediately on delivery of the deed.

588. Conclusion.—This mentions the date of the deed and the fact of its execution. The date may be at the beginning of the deed or at its conclusion and the real date may be given or a fictitious one substituted. If a deed have no date it will take effect from its delivery.

***In witness whereof,** The said party of the first part have hereunto set their hands and seals, the day and year first above written.*

589. Signing and Sealing.—The fifth requisite of a valid deed is that it must be signed and sealed. (See sec. 28.) Some few States as we have seen have abolished seals. Where this is the case they need not be affixed to deeds.

Signed, Sealed and Delivered in the Presence of
J. L. TALBOT,
J. H. SMITH.

CHARLES H. HATHAWAY, [SEAL]
LAURA HATHAWAY, [SEAL]

590. Acknowledgment.—This may generally be done before any officer having an official seal; it may also be done before a justice of the peace. The acknowledgment is taken by the grantor going before a person qualified by law to receive acknowledgments, and exhibiting the deed, acknowledging it as his free act and voluntary deed, to which the officer certifies on the deed under his official seal. In most States a deed must be acknowledged in order to be entitled to record. In some States the officer must examine the wife separate and apart from her husband, and certify to its being her free and voluntary act.

As between the parties themselves, a deed is valid though not acknowledged. In some States, in addition to being officially acknowledged, the deed must be attested by one or more witnesses. An attorney, A B, who executes a deed for another, C D, should acknowledge it as "the free and voluntary act of the said C D," and not his own.

State of Illinois, } *ss.*
County of Cook. }

*I, Lawrence Y. Sherman, a Notary Public in and for the said County, in the State aforesaid, **Do Hereby Certify that** Charles H. Hathaway and Laura Hathaway, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they*

signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and official seal, this twenty-fourth day of August, A. D. 1901.

LAWRENCE Y. SHERMAN,
[SEAL.] *Notary Public.*

591. Delivery.—It is essential to the validity of an instrument that it be delivered. If it be stolen it has no effect. It may be handed to a third person to deliver on the happening of a certain event, in which case it is called an *escrow*.

592. Release of Dower and Homestead.—This subject is now regulated by statute, and it will, therefore, be impossible to give any absolute general rule in regard to it. By way of general explanation we may say that the object of a wife's joining in the deed with her husband, is often to release these estates. The deed and acknowledgment should name and describe her as the wife of the grantor. In many States her signing the deed does not release anything unless it contains definite words expressing her intention to release or convey such rights or interests. The husband may sell and give possession without the wife's joining, but the grantee's title would be defective, and subject to the wife's estate, to take effect on the death of her husband.

And the said party of the first part hereby expressly waives and releases any and all right, benefit, privilege, advantage and exemption, under or by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise.

593. Recording.—The system of registering titles is common to all States, and is certainly an admirable feature of our real estate law. The entire instrument is copied and preserved in fire-proof vaults, and these records are open to the inspection of the public, who are supposed to take notice of all facts contained therein. By this means every purchaser may ascertain exactly the title he is getting. Other things being equal, priority of record gives priority of title. For this reason the recorder certifies on the instrument to the fact of its being recorded, and gives the day and hour it was filed. The instrument is deemed to be recorded as soon as it is delivered for record.

594. Covenant Against Grantor.—If the vendor is not willing to give a full warranty deed, he may be willing to give a deed with

warranties against his own acts only. In this case the following provision may be inserted before the conclusion in a quit claim deed.

And The said parties of the first part, for themselves and their heirs, executors and administrators, do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that the said premises, against the claim of all persons claiming or to claim by, through or under them, only they will forever warrant and defend.

595. Quit Claim Deed.—A quit claim deed simply conveys whatever right the grantor has, be that much or little. A warranty deed is to be preferred by a purchaser, not alone on account of the covenants, but also from the fact that a warranty deed conveys after acquired title, while a quit claim does not.

A sells B a certain piece of ground, and gives a warranty deed, but at the time of the sale A's title was defective, another party holding an interest in it. Afterwards A secures to himself this outstanding title, but it passes at once to B by the warranty deed already given.

QUIT CLAIM DEED.

This Indenture, *Made this 22d day of August, in the year of our Lord One Thousand Nine Hundred One, between Charles H. Hathaway and Laura Hathaway, his wife, of the City of Chicago, in the County of Cook, and the State of Illinois, party of the first part, and Martin F. Deale, of the Township of Pella, in the County of Ford, and State of Illinois, party of the second part,*

Witnesseth, *That for and in consideration of the sum of Two Thousand Dollars in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, the said party of the first part has remised, released, sold, conveyed and quit claimed, and by these Presents does remise, release, sell, convey and* ***Quit Claim*** *unto the party of the second part, his heirs and assigns* FOREVER, *all the right, title, interest, claim and demand, which said party of the first part has in and to the following described lot, piece or parcel of land, situated in the County of Cook and State of Illinois, and known and described as follows, to-wit:*

The South East quarter (S. E. ¼) of the North West quarter (N. W. ¼) of Section twenty-nine (29), Township thirty-eight north (38 N.) of Range fourteen (R. 14), East of the third principal meridian.

To Have and to Hold *the same, together with all and singular the appurtenances and privileges thereunto belonging, or in any wise thereunto appertaining; and all the estate, right, title, interest and claim whatever, of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.*

And *the said party of the first part hereby expressly waives and releases any and all right, benefit, privilege, advantage and exemption, under or by*

virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise.

***In witness whereof**, the said party of the first part have hereunto set their hands and seals the day and year first above written.*

CHARLES H. HATHAWAY. [SEAL]
LAURA HATHAWAY. [SEAL]

Acknowledged as in section 590.

CHAPTER LXIX.

CONVEYANCES—CONTINUED.

596. Mortgage.—A mortgage is a deed of conveyance operating as a pledge of property for the security of a certain debt or obligation. It is in form an actual transfer of the title, with a clause or condition that if the debt or obligation be satisfied, then the transfer to be of no effect. This is called the clause of defeasance. The one who gives the mortgage is called the mortgagor, and the one to whom the mortgage is given is called the mortgagee. A mortgage is executed the same as a deed. The wife should join in a mortgage the same as in a deed, except in case of a mortgage for part of the purchase money, when she need not sign, though she may do so.

MORTGAGE.

This Indenture, *Made this 24th day of August, in the year of our Lord One Thousand Nine Hundred and One, between Martin F. Deale, of the Township of Pella, in the County of Ford, and State of Illinois, party of the first part, and Charles H. Hathaway, of the City of Chicago, in the County of Cook and State of Illinois, party of the second part:*

***Whereas,** The said Martin F. Deale is justly indebted to the said party of the second part in the sum of One Thousand Dollars, evidenced by one certain promissory note of even date herewith, bearing 6 per cent interest per annum from date, and due one year from date.*

***Now, Therefore, this Indenture Witnesseth,** That the said party of the first part, for the better securing the payment of the money aforesaid, with interest thereon, according to the tenor and effect of the said promissory note above mentioned, and also in consideration of the further sum of One Dollar to him in hand paid by the said party of the second part, at the delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, conveyed, aliened and confirmed, and by these*

presents does grant, bargain, sell, remise, release, convey, alien and confirm unto the said party of the second part, and to his heirs and assigns FOREVER, *all the following described lot, piece or parcel of land, together with all the rents, issues and profits thereof, situate in the City of Chicago, County of Cook, and State of Illinois, and known and described as follows, to-wit:*

The South East quarter (S. E. ¼) of the North West quarter (N. W ¼) of Section twenty-nine (29), Township thirty-eight north (38 N.), of Range fourteen (R. 14), East of the third principal meridian.

***To Have and to Hold** the same, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, or in any wise appertaining; and also all the estate, interest and claim whatsoever, in law as well as in equity, which the said party of the first part has in and to the premises hereby conveyed unto the said party of the second part, his heirs and assigns, and to their only proper use, benefit and behoof forever.*

***Provided, always,** And these presents are upon this express condition, that if the said party of the first part, his heirs, executors, administrators or assigns, shall well and truly pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators or assigns, the aforesaid sum of money, with interest thereon, at the time and in the manner specified in the above mentioned promissory note, according to the true intent and meaning thereof, then and in that case these presents and everything herein expressed, shall be absolutely null and void.*

***And in Consideration** of the money loaned as aforesaid to the said party of the first part, and in order to create a first lien and incumbrance on said premises under this mortgage, for the purposes aforesaid, and to carry out the foregoing specific application of the proceeds of any sale that may be made by virtue hereof the said party of the first part does hereby release and waive all right under, and benefit of, the exemption and homestead laws of the State of Illinois, in and to the lands and premises aforesaid, and the proceeds of sale thereof, and agrees to surrender up possession thereof to the purchaser or purchasers at such sale, or to any receiver that may be appointed by the court, peaceably on demand.*

(Here insert the same covenants as in Warranty Deed.)

***In witness whereof,** The said party of the first part has hereunto set his hand and seal the day and year first above written.*

MARTIN F. DEALE. [SEAL]

In this form are often inserted three further provisions; the first provides that if any installment of interest be not paid when due, then the whole debt may be declared due and payable at the option of the mortgagee. The second obligates the mortgagor to keep any building insured against fire in some solvent company, and in favor of the mortgagee, "as his interest may appear." In case of failure to insure the property, the mortgagee is to have the right, and to add the cost to the debt. The third clause refers to the payment of taxes and assessments, and gives the mortgagee the same rights as

the provision in reference to insurance. In some States when the mortgage binds the mortgagor to pay an attorney's fee in case suit is brought to foreclose the mortgage, it will be upheld, and added in with the other court costs.

597. Equity of Redemption.—A mortgage does not convey the entire estate of the mortgagor, but still leaves with him an estate called the equity of redemption. That is, he has the right to a reconveyance of the property on tendering the full amount of the debt, including interest. This equity of redemption may be sold and conveyed by deed, and the grantee will then take the place of the mortgagor.

598. Sale of the Mortgage.—The giving of a mortgage divides the estate into two parts. We have seen that the mortgagor may sell and convey his part, and so may the mortgagee also. This is usually accomplished by a deed of assignment, which may be in the following form:

ASSIGNMENT OF A MORTGAGE.

Know All Men by These Presents, *That I, Cassius O. Smith, of the City of Peoria, in the State of Illinois, the mortgagee named in a certain mortgage deed, given by Edgar P. Farr, of Sioux City, in the State of Iowa, to said Cassius O. Smith, to secure the payment of Four Hundred Dollars, dated the 8th day of September, A. D. 1901, and recorded in the Recorder's Office of Peoria County, in the State of Illinois, in Book N of mortgages, page 326, in consideration of the sum of Four Hundred and Twenty Dollars to me paid by Albert A. Blair, of Chatsworth, in the State of Illinois, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer, set over and convey unto said Albert A. Blair and his heirs and assigns, said mortgage deed, the real estate thereby conveyed, and the promissory note, debt and claim thereby secured, and the covenants therein contained.*

***To Have and to Hold** the same to him, the said Albert A. Blair, and his heirs and assigns, to his and their use and behoof forever; subject, nevertheless, to the conditions therein contained, and to redemption according to law.*

***In witness whereof,** the said party of the first part has hereunto set his hand and seal the day and year first above written.*

CASSIUS O. SMITH. [SEAL]

While a formal assignment is considered preferable, yet the mere endorsement and transfer of the notes, secured by the mortgage, carry with them all rights under the mortgage.

599. Second Mortgage.—Not only may the mortgagor sell his estate, but he may mortgage it as often as he can find a mortgagee willing to accept a mortgage. These mortgages have preference in their order. If it takes the entire property to satisfy the first mort-

gage, subsequent mortgagees will get nothing. If the first mortgage be paid and discharged, this will advance the second to first place.

600. Mortgagee's Remedies.—A mortgage, as we have said, is drawn to secure either a debt or an obligation. In case it is the former, it is usually evidenced by one or more notes, which are fully described in the mortgage. The mortgagee may sue on these notes and disregard the mortgage, in which case he gets a personal judgment against the mortgagor, a judgment that will be a lien upon all his property, not exempt (sec. 92), or he may foreclose, (sec. 601), and in his bill of foreclosure he may ask that in case the proceeds of the sale of the property do not satisfy the debt, that he may have a personal judgment over for the balance. If one or more notes are not given, but only the mortgage evidences the debt, no liability exists for the deficit in case the property when sold does not pay the debt in full.

When one buys real property, that is mortgaged, the deed that he gets may recite that he buys it "*subject to the mortgage*," or "*that he assumes the mortgage.*" There is a vast difference in the meaning of these provisions. In the former, if the sale of the premises does not produce enough to pay the mortgage debt, no personal judgment can be secured against the purchaser of the equity of redemption. In the latter case, a judgment may be secured against him for the deficit, for he has assumed its payment, which agreement inures to the benefit of the mortgage creditor.

601. Foreclosure.—The course most commonly pursued to realize on a mortgage when there has been a default, is to file a bill of foreclosure. This is now largely a matter of statute. The decree of court gives power to advertise, for a certain time, the property for sale, after which it is sold at public sale, to the highest bidder. If anything remains of the sale price after the payment of the debt and costs it is turned over to the mortgagor. This does not entirely shut the mortgagor out, for he still has some time, called the period of redemption, in which to repay the purchaser, and regain title to his property, and usually during this period he may retain possession thereof.

602. Discharge.—When a mortgage is paid it should be discharged of record, so that the title may be cleared. This may be done by the mortgagee making a personal discharge on the margin of the record, or when this is impracticable, it should be done by a release deed, which is acknowledged, and recorded as before described.

RELEASE DEED.

Know All Men by These Presents, *That I, Charles H. Hathaway, of the County of Cook and State of Illinois, for and in consideration of One Dollar, and for other good and valuable considerations, the receipt whereof is hereby confessed, do hereby remise, convey, release and quit-claim unto Martin F. Deale, of the County of Ford and State of Illinois, all the right, title, interest, claim or demand whatsoever I may have acquired in, through or by a certain mortgage deed bearing date the 24th day of August, A. D. 1901, and recorded in the Recorder's office of Cook County, in the State of Illinois, in Book M of Mortgages, page 187, to the premises therein described, as follows, to-wit:*

The South East quarter (S. E. ¼) of the North West quarter (N. W. ¼) of Section twenty-nine (29), Township thirty-eight north (38 N.) of Range fourteen (R. 14), East of the third principal meridian.

Together with all the appurtenances and privileges thereunto belonging or appertaining,

***Witness,** my hand and seal this first day of September, A. D. 1901.*

CHARLES H. HATHAWAY. [SEAL]

The law does not impose on the mortgagee the duty of preparing this release, but it does impose on him the duty to execute it when presented to him, together with his reasonable expenses for doing so. In many States he is liable to heavy damages for his refusal.

603. Trust Deed.—In many States, and especially in the large cities, trust deeds have largely superseded mortgages. In the trust deed a conveyance is made to a third person, called the trustee, who holds the naked title for the benefit of the creditor. In case the debt is represented by notes, it enables the creditor, called also the beneficiary, to sell and dispose of these notes to different parties, or all to one party, and the trustee holds the title to the property for the benefit of all. For this reason it is much preferred by those creditors who expect to transfer the notes.

The remedy formerly was to have the trustee sell the property immediately on default, and thus deprive the debtor of his equity of redemption, but many states now provide by Statute that a trust deed must be regularly foreclosed in the same manner as a mortgage.

604. Real Estate Contract.—When land is purchased, the sale is usually evidenced by a contract, which must be in writing, (sec. 99). This contract, it will be observed, contains, in addition to all the essential features of the agreement, a provision that the seller is to furnish to the purchaser a complete abstract of title, showing an indefeasible title in the seller, and that the purchaser is to have a

certain length of time in which to examine it. When the title has been found perfect, then the sale is completed by paying over the money and taking a deed, or complying with any other provisions of the contract. It will thus be seen that the office of the contract is usually to bridge over the period between the agreement and such time as the purchaser can satisfy himself that the title is good.

REAL ESTATE CONTRACT.

This Memorandum Witnesseth, *That Charles H. Hathaway hereby agrees to sell, and Martin F. Deale agrees to purchase at the price of Two Thousand Dollars the following described real estate, situated in Cook County, Illinois: The South East quarter (S. E. ¼) of the North West quarter (N. W. ¼) of Section twenty-nine (29), Township thirty-eight north (38 N.), of Range fourteen (R. 14), East of the third principal meridian. Subject to (1) existing leases, the purchaser to be entitled to the rents, if any, from the time of delivery of Deed; (2) all taxes and assessments levied after the year 1901; (3) any unpaid special taxes or assessments levied for improvements not yet made.*

***Said Purchaser** has paid One Hundred Dollars as earnest money, to be applied on said purchase when consummated, and agrees to pay, within five days after the title has been examined and found good, the further sum of Nine Hundred Dollars, at the office of Charles H. Hathaway, Chicago, provided a good and sufficient full covenant Warranty Deed, conveying to said purchaser a good title to said premises (subject as aforesaid), shall then be ready for delivery. The balance to be paid as follows: One Thousand Dollars in one year, with interest from August 24th, at the rate of 6 per cent per annum, payable annually, to be secured by notes and mortgage, of even date herewith, on said premises. A complete Abstract of Title, or merchantable copy, to be furnished, within a reasonable time, with a continuation thereof brought down to this date. In case the title, upon examination, is found materially defective, within ten days after said Abstract is furnished, then, unless the material defects be cured within sixty days after written notice thereof, the said earnest money shall be refunded, and this contract to become inoperative.*

Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vendor, be forfeited as liquidated damages, including commissions payable by vendor, and this contract shall be and become null and void. Time is of the essence of this contract, and of all the conditions thereof.

***This Contract** and earnest money shall be held by J. L. Talbot, for the mutual benefit of the parties hereto.*

***In Testimony whereof,** said parties hereunto set their hands, this 22d day of August, A. D. 1901.*

CHARLES H. HATHAWAY.
MARTIN F. DEALE.

605. Abstract of Title.—This is a brief epitome of the records of title pertaining to any given piece of realty. It is prepared by persons skilled in the matter. Only the essential features of a conveyance are given, but if there are any defects in a conveyance they are noted. Liens, including judgments, are noted, in fact everything of record having a bearing on the title is noted for the inspection of the examining attorney.

PART OF AN ABSTRACT OF TITLE.

17 *Frank Seifried, bachelor, to George F. Borman.* Doc. 343,839.

Quit Claim Deed, dated March 26, 1880, recorded Aug. 20, 1881, book 1,047, page 639.
Consideration $5[00].
Conveys and quit claims all interest in the following described real estate, to wit: Lot 14 in Block 13, in Duncan's Addition to Chicago; also the North half of the South half, and the South half of the North half of the North East quarter of the North East quarter of Section 13, T. 38 N., R. 13 E. of the 3d P. M., in Cook County, Illinois.
Homestead rights waived.
Acknowledged March 26, 1880.

18 *Henrietta L. McGrath and Thomas McGrath to Jacob R. Custer* Doc. 316,193.

Mortgage, dated March 18, 1881, recorded March 22, 1881, book 1,076, page 270.
To secure payment of $500.
Mortgage and warrant all their undivided interest in and to the following described real estate, to wit: Lot 14 in Block 13, in Duncan's Addition to Chicago. Also the North half of the South half, and the South half of the North half of the North East quarter of the North East quarter of Section 13, T 38 N., R. 13 E. of the 3rd P M., except about 1¾ acres heretofore sold to the -- park commissioners, in Cook Co. Ill.
Acknowledged March 18, 1881

19 *Jacob R. Custer to Henrietta L McGrath & Thomas—McGrath.* Dec 343,841

Release, dated Aug 20, 1881, recorded Aug. 20, 1881, book 1,134, page 223.
Consid. $1[00] &c.
Releases all right, title interest, &c., acquired by mortgage, bearing date March 18, 1881, and recorded &c., in book 1,076 of records, page 270, to the premises therein described as follows, to wit: Lot 14 in Block 13 in Duncan's Addition to Chicago, also North half of South half and South half of the North half of the North East quarter of North East quarter of Section 13, T 38 N., R 13 E. of the 3d P. M., except about 1¾ acres heretofore sold to the-park commissioners
Acknowledged Aug. 20, 1881

We have examined our indexes to records in Cook County, Illinois, and find:
No conveyances of the premises described in the caption hereto, executed by any of the parties named herein as grantor or grantee, shown thereby to have been recorded in the recorder's office of said county since February 12, 1875, except as shown on the twenty-one (21) preceding sheets.
No judgments rendered in any court of record in said county against Adolph Carl Heinrich Bormann on July 6 & 7, 1874, or since Feby. 12, 1875, & prior to Aug. 30, 1881; Frank Seifried since Oct. 8, 1871, & prior to Aug. 21, 1881; George Friedrich Bormann or Henrietta Louise Bormann (or McGrath) on July 6 & 7, 1874, & since Feb. 12, 1875, or Henry Seifried since Oct. 8, 1871, which we consider liens on said premises.
NOTE. No examination made for judgments vs. the South Park Park Commissioners, or against "Frederick Bormann."
No tax sales or forfeitures of said premises appearing on record as had on or since Septr. 28, 1874, not marked cancelled or paid.
CHICAGO, March thirteenth (13th), 1882.

HADDOCK, VALLETTE & RICKCORDS,
Successors to Haddock, Coxe & Co.

CHAPTER L.

LANDLORD AND TENANT.

606. Introduction.—The relation between landlord and tenant has become very important. The owner is the landlord, or lessor, and the person to whom the property is leased is called the tenant, or lessee. The compensation agreed to be paid is the rent, and the contract, whether verbal or written, is called the lease.

LEASE.

This Indenture, *Made the 28th day of August, in the year of our Lord one thousand nine hundred one,*

Witnesseth, *That I, Henry T. Clarke of the City of Jacksonville in the County of Morgan and State of Illinois, do hereby lease, demise, and let unto Henry Templeton of the City of Chicago, County of Cook and State of Illinois, a certain house in said last named city, known as No. 516 W. Taylor Street, with the land under and adjoining the same.*

To Hold *for the term of one year from the 30th day of August, 1901, yielding and paying therefor the rent of twelve hundred dollars.*

And said lessee does promise to pay the said rent in four quarterly payments on the first day of September, December, March, June, and to quit and deliver up the premises to the lessor or his attorney, peaceably and quietly at the end of the term, in as good order and condition, reasonable use and wear thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said lessor, and to pay the rent as above stated, and all taxes and duties levied or to be levied thereon during the term, and also the rent and taxes as above stated, for such further time as the lessee may hold the same, and not make or suffer any waste thereof; nor lease, nor underlet, nor permit any other person or persons to occupy or improve the same, or make or suffer to be made any alteration therein but with the approbation of the lessor thereto in writing, having been first obtained; and that the lessor may enter to view, and make improvements, and to expel the lessee, if he shall fail to pay the rent and taxes as aforesaid, or make or suffer any strip or waste thereof.

In witness whereof, *The said parties have hereunto interchangeably set their hands and seals the day and year first above written.*

Signed, Sealed and Delivered in the Presence of

HENRY T. CLARKE. [SEAL]
HENRY TEMPLETON. [SEAL]

607. The Lease.—This being a contract within the provisions of the Statute of Frauds, it must be in writing if for longer than one year. In some States, by statute, the time is extended to three years. By common law the lease need not be sealed, but if it is to be recorded it must, in many States, be both sealed and acknowledged. In order to protect tenant in the enjoyment of a long lease, many States require it to be recorded. In Connecticut, Mississippi, Oregon, Rhode Island, South Carolina, Tennessee and Vermont, if leases are given for longer than one year, they should be recorded. In Maine, Maryland, Massachusetts and New Hampshire, if for seven years or longer, they should be recorded, and in Texas all leases should be recorded. The lease should be signed by both parties, and it should be made in duplicate, each party retaining a copy.

608. Parts of a Lease.—The words usually used in the granting clause are "demise and lease," but these exact words are not necessary. The premises should be so described that they can be identified with certainty. The length of the lease is usually a matter of agreement, and may be as long as the parties may choose, but the landlord cannot grant for a longer term than he has. In large cities a lease for ninety-nine years, and even longer, is not an uncommon thing.

609. The Rent.—The amount of rent is usually agreed upon in advance, but it may be left to future determination. It may be a gross sum in advance, a portion of the crops, or a certain monthly sum. In such cases, in the absence of agreement, it is not due until the end of the month. When nothing is said about the place of payment, it is sufficient if tendered on the premises.

610. Lessor's Covenants.—The covenants frequently found in leases on the part of the lessor, are guarantee to the lessee of quiet enjoyment, protection against incumbrances, repairs, renewal of the lease, and payment of taxes and assessments. There may be other covenants peculiar to the special case. The covenant of quiet enjoyment is implied, and exists whether stated or not. Without a covenant for protection against incumbrances, if the lessee should be evicted by a mortgagee, he would lose all his rights under his lease. With the covenant he may look to the lessor for reimbursement.

The covenant to repair can never rest upon mere implication, for

the common law, with regard to expenses of this kind, presumes so strongly against the lessee that even though the premises should be burned to the ground, he must continue to pay rent in the absence of an express covenant to the contrary in his lease, and yet have no power to compel the lessor to rebuild. In other words, the tenant takes the premises for better or for worse. If the house is dilapidated and disfigured as to paint and paper, locks and blinds, still the tenant can claim nothing from the landlord. But many written leases provide for the abatement or suspension of rent "in case of fire or other unavoidable casualty," rendering the premises unfit for use, and in some States the rule has been so altered as to imply the lessor's covenant to repair.

A covenant to renew the lease gives the option to the lessee to leave or remain at the end of his term, as he may elect. The covenant on the part of the lessor to pay taxes and assessments, is generally implied.

611. Lessee's Covenants.—The lessee may covenant to repair, to pay rent, to pay taxes and assessments, not to assign, to use for certain purpose, to redeliver. As in the case of the lessor's covenants, these may vary in different cases, according to circumstances. As we have seen, the lessee's covenant to repair is implied at common law, he need not, however, make good the ordinary ravages of time. Waste on a tenant's part, whether voluntary or permissive, is not, of course, tolerated.

The payment of rent according to agreement, scarcely needs a covenant on the part of the lessee, but will be implied, and will not ordinarily be excused. Though fire and flood may have made the premises uninhabitable, yet unless the lessee has protected himself by suitable stipulations to the contrary, or a local statute changes the rule of the common law, he must pay his rent.

When the agreement is that the lessee is to pay the taxes and insurance, the lease should so state. So also when the tenant is not to have the right to assign or sub-let, for at common law the tenant undoubtedly has such right, though he cannot release himself from liability to his landlord. It is usual for this covenant to be inserted in modern leases, for the landlord is disposed to choose his own tenants. It is a covenant, however, which the courts are not disposed to extend by construction. If the tenant covenants "to return and redeliver the house at the end of the term, in good order and condition, reason-

able wear and tear only excepted," he is bound under this agreement to rebuild the house if it is burned down. For this reason modern leases often add to the exception noted above, "damage by fire and other unavoidable accidents also excepted," or "damage by the element and the acts of God excepted." This has the effect of relieving the tenant from rebuilding.

612. Fixtures.—There are some improvements a tenant may add during his term, and at its termination may take them away with him. There are other things which he cannot take with him. What he cannot take are called fixtures. Fixtures are those chattels which, by being annexed as appendages to the realty, become part thereof. This question is not only material as between lessor and lessee, but between the grantor and grantee of realty. No absolute rule suited to every case can be formulated, for much depends upon circumstances and intention. Also a more rigid rule seems to obtain between grantor and grantee than between lessor and lessee. It has been held that whatever the tenant has added for the purposes of trade, and can be removed without manifest injury to the realty, he may remove, otherwise it is a fixture. The method of affixing is often material in determining this question. Thus, if fastened with screws, it may evince a disposition or intention to remove them. Among the things held to be removable in different cases are these: stoves, pumps, gates, looking glasses, stables on blocks, gas fixtures, counters used for trade. Among those held not removable are: barns fixed in the ground, trees, plants and hedges, not belonging to a gardener by trade, windows, locks and keys. A tenant for years is not entitled to emblements.

613. Notice to Quit.—One of the ways by which a tenancy may be terminated is by a notice to quit, given in a regular manner and under suitable circumstances. If one holds a lease for years, he is not entitled to a notice to quit at the expiration of that time, for he has no right to remain longer. But if, as frequently happens, the lessor consents to the lessee's holding over, he then becomes a tenant from year to year, month to month, or other appropriate period for paying rent, and must be served with a proper notice to quit before an action of ejectment can be brought. The notice need not be formal, but should specify the particular day to quit, and must be written. The time when a notice should be given is very important, and is largely governed by statutory regulations, which should always

be consulted. In general, the time is that period which intervenes between successive rent days, except it be for the non-payment of rent, when a much shorter period will usually suffice.

The right of notice to quit is reciprocal, and it can be given by the tenant as well as the landlord.

REVIEW QUESTIONS.

1. Define real property. 2. What is the source of our real estate law? 3. What was the feudal system? 4. Define an estate. 5. What is an inheritable estate? 6. What is a fee simple? 7. Define a fee tail. 8. Give the non-inheritable estates. 9. What is the objection to a fee tail? 10. What is a life estate? 11. What rights has a life tenant? 12. What are the duties of a life tenant? 13. What are emblements? 14. What is the rule as to whether a tenant is entitled to emblements or not? 15. Define dower. 16. How is it released? 17. Define curtesy. 18. What is an estate for years? 19. What is a freeholder? 20. What is a remainder? 21. What is a reversion? 22. Give an illustration of a remainder, also of a reversion. 23. What is a deed? 24. Name eight kinds of deeds. 25. What are the requisites of a deed? 26. What can you say about "words of inheritance"? 27. How does a warranty deed differ from a warranty deed full covenant? 28. What is an acknowledgment? 29. What is the object of recording an instrument? 30. What is a quit claim deed? 31. What is a mortgage? 32. What is an equity of redemption? 33. Can a mortgagee sell his interest in the mortgaged premises? 34. Can a mortgagor transfer his interest in the mortgaged premises? 35. What remedies has a mortgagee? 36. How is a mortgage discharged? 37. What is the difference between buying property subject to a mortgage and buying it, assuming the mortgage? 38. What is a trust deed and how does it differ from a mortgage? 39. Why is it often preferred to a mortgage? 40. What is the use of a real estate contract? 41. What is an abstract of title? 42. What is a lease? 43. What words are used in the granting clause of a lease? 44. What are the lessor's covenants? 45. What are the lessee's covenants? 45. What are fixtures? 47. What is the rule as to ownership of fixtures? 48. How may a landlord get possession of the premises?

FORM OF CONTRACT.

Testatum. What second party agrees to do. What first party agrees to do. Consideration. Premises.

This Agreement, *Made this 28th day of June, A. D. 1901, by and between Thomas Knapp, party of the first part, of Aurora, Ill., and Charles Wood, party of the second part, of Wheaton, Ill., witnesseth:*

That the said first party in consideration of the sum of $100 to be paid to him as hereinafter mentioned by the said second party, and further in consideration of the promises and covenants made by the said second party, agrees to grind for said second party into a good and salable quality of corn meal of the usual fineness, 500 bus. of corn. The said first party further agrees to furnish a good quality of cotton sacks and to deliver said corn meal to the said second party at the mill of said first party in Aurora, Ill., on or before the first day of August, A. D. 1901, in said sacks properly tied and of the uniform size or weight of 50 lbs.

Said second party agrees to furnish to said first party at his said mill, on or before the 5th day of July, the 500 bus. of shelled corn mentioned above, which is to be of a good quality of "clear white," capable of making the quality of meal described above. Said second party further agrees to receive said meal at the mill of said first party, on the first day of August, and to pay to said first party on the delivery or tender of said meal at said mill by said first party $100 cash.

Witness our hands to two copies of this agreement executed in duplicate.

THOMAS KNAPP.
CHARLES WOOD.

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1. Write contract for A of Lowell, Mass., who agrees to make for B of Elgin, Ill., and deliver to him f. o. b. Elgin, 50 dozen ladies' leather shoes according to sample submitted and agreed upon and of sizes from 3 to 6. B is to pay $1.75 per pair 30 days after delivery.

2. Write contract for A and B of New York City, who agree to enter into partnership in the manufacturing of wagons. A to invest $25,000 and his services. B to invest $15.000 and his services; gains and losses to be shared equally. The relation to last five years. Put in any other provisions you may think proper.

3. Write contract for A and B, each of Springfield, Mass A is to build for B a house on a certain lot (describe it) and according to plans and specifications annexed. B is to furnish and deliver all materials. The consideration to be $1,000 paid as follows: two hundred dollars when the foundation is complete. Two hundred dollars when the building is enclosed. The remaining six huudred dollars when said building is fully completed and the keys delivered.

GLOSSARY.

Abandonment. The relinquishing of salvage to the insurers with a view to claiming the full amount of insurance.

Abatement. Discount or reduction in price.

Acceptance. The agreement (usually written on the bill) by the drawee of a draft to comply with the request of the drawer.

Acknowledgment. The avowal of the genuineness of one's signature to a document.

Acquittal. A judicial discharge; a verdict of not guilty.

Action. A legal process or suit.

Administer. To take charge of the estate of a person dying without making a will, for the purpose of settling the same.

Advancement. A payment made to a child by a parent to be considered as a part of his share of such parent's estate.

Affidavit. A statement or declaration sworn to before some one authorized to administer oaths.

Affirm. To make a solemn promise to tell the truth under the penalties of perjury.

Alias. A Latin word meaning otherwise.

Alibi. Elsewhere.

Alien. A foreigner who is not naturalized in the country of his residence.

Alienate. To transfer property, particularly real property.

Alimony. The allowance granted to a woman on a legal separation from her husband.

A mensa et thoro. From table and bed; a limited divorce.

Appraise. To set a price upon.

Arbitration. The trial of a cause in controversy by an unofficial person or persons chosen by the contestants.

Arraign. To call to answer to an indictment before a court.

Assault. An attempt to do corporal injury to another.

Assign. To make over to another.

Assignee. One to whom a right or property is made over.

Assigns. Persons to whom property mentioned in a deed may be assigned.

Attach. To take by a writ of attachment.

Attestation. The act of witnesses in avowing the execution or signature of a deed.

Bail. To release on security.

Bailee. One to whom the goods of another are delivered.

Bailment. The delivery of goods to another in trust for a certain purpose.

Bailor. One who delivers goods in trust.

Bankrupt Law. A law by which if an insolvent debtor assigns all his property to another to be used for the common benefit of his creditors he is forever discharged from further payment of his existing debts.

Battery. The unlawful beating of another.

Betterment. Improvements made on real estate.

Bigamy. The offence of contracting a second marriage while an undivorced husband or wife still lives.

Bill. A formal complaint or petition to a court of equity. A proposed law.

Bill of Lading. A written contract of a transportation company acknowledging the receipt of goods and undertaking to carry and deliver them to a certain place for a consideration.

Bill of Sale. A writing under seal conveying the title to personal property.

Bond. A writing under seal agreeing to pay a certain sum of money or perform a certain act.

Burglary. The crime of breaking open and entering the dwelling of another with intent to commit a felony.

By-law. A rule or law agreed upon by the members of a society or corporation for their action.

Caveat. A warning or caution; an instrument securing to an inventor exclusive rights to his invention before the patent is granted.

Cestuy que trust. The beneficiary in a trust.

Chancery. A court of equity

Charge. To lay or impose a duty or obligation.

Chattel. Any specie of personal property.

Chose in Action. Any personal chattel of which one has not the possession but a right of action to reduce it to possession.

Chose in Possession. Personal property in possession.

Civil Law. The Roman law; the municipal law.

Client. One who employs an attorney.

Collateral. Side by side and not in a direct line.

Common Law. Those customs, rules and decisions that in consequence of long usage have now come to have the full force and effect of law.

Consanguinity. Relationship by blood or birth.

Conservator. A guardian.

Consideration. The motive; the legal inducement to enter into a contract.

Contract. An agreement between two or more competent persons based on a consideration to do or not to do some lawful thing.

Copyright. The exclusive right given an author to his production.

Corporation. An artificial person; a body of persons associated together by law and endowed with the power of acting for some purposes as a single individual.

Curtesy. The life estate a husband has in real property of his deceased wife, when there has been a child born capable of inheriting the same.

Covenant. A mutual agreement in writing.

Crime. A violation of law.

Damages. A money satisfaction for an injury.

Declaration. The plaintiff's cause of action in a suit, set forth in a legal and orderly manner.

Decree. The judgment or decision of a court of equity.

Deed. A writing, signed, sealed and delivered.

De facto. In fact; in reality.

Defendant.—The party against whom an action is brought.

Demise. The conveyance of real property.

Demur. To pause; to raise an objection.

Deponent. One who makes oath to a written statement.

Devise. To grant by will.

Dishonor. Refuse or neglect to accept or pay a draft.

Distrain. To seize the goods of a tenant for payment of rent.

Domicile. The habitation of a person.

Draft. An order or request drawn by one party on another for a certain sum of money.

Due Bill. An acknowledgment of a debt in writing.

Earnest. Part of the purchase price paid to evidence the ratification of a bargain.

Easement. A privilege, such as a right of way.

Eminent Domain. The right of a sovereign body to take private property for public use.

Emblement. Growing crops on land.

Entailment. The act of giving an estate and directing its future descent.

Equity. A system of jurisprudence supplemental to law.

Escrow. A deed or other written instrument delivered to a third person to to be held till some certain contingency happens and then delivered to the grantee.

Estate. The quantity of interest a person has in property.

Estop. To bar or hinder by some rule of law.

Execution. That writ which empowers an officer to execute a judicial sentence; the signing, sealing and delivering of a deed.

Executor. One who is named in a will to execute its provisions.

Ex post facto law. A law which makes an act done before its passage a crime.

Fee Simple. An absolute estate of inheritance free from any conditions.

Fee Tail. An estate of inheritance descendible to a certain line of heirs.

Felony. A crime punishable by death or imprisonment.

Feme Sole. An unmarried woman.

Franchise. A right or privilege.

Freehold. Any estate of inheritance or a life estate.

Grant. To convey by deed.

Guarantor. One who agrees to warrant the performance of some act by another.

Guardian. One named to have the care and custody of the person or property of one legally incapable of managing his own affairs.

Heir. One who inherits.

Heirloom. Any chattel which by law descends with land to the heir.

Hereditament. Anything which may be inherited.

Incorporate. To form into a corporation.

Indorse. To put one's name on the back of an instrument with intent to evidence a contract.

Infant. A person not of age.

Injunction. A writ issued by a court of equity prohibiting a person from doing a certain thing.

Inquest. A judicial inquiry.

Intestate. Dying without making a will.

Joint Stock Company. A partnership partaking of some of the features of a corporation.

Joint Tenancy. That peculiar method by which two or more persons hold real property in common and on the death of one his share shall go to the survivors.

Judgment. Decision of a court.

Jurisdiction. The legal authority of a court.

Law merchant. A system of rules deduced from the customs of merchants, by which trade and commerce are regulated.

Lease. The instrument by which an estate for years is conveyed.

Legacy. A gift of goods and chattels by will.

Lien. A right to retain another's property until a demand is satisfied; a charge upon real or personal property.

Malfeasance. A wrongful act.

Mandamus. A writ issued by a superior court to an inferior, or an officer commanding something to be done.

Misdemeanor. An offense punishable by a fine.

Mortgage. A deed with a clause of defeasance; a pledge.

Negotiability. That property of certain contracts by virtue of which when they are transferred under certain conditions, they pass free and clear of defenses.

Notary Public. A public officer before whom acknowledgments of deeds, oaths, etc., may be taken.

Ordinance. A law of a minor municipal corporation.

Parol. By word of mouth.

Parol Contract. Any contract not under seal.

Plea. The formal allegation of fact which a defendant makes to the plaintiff's declaration.

Pledge. Anything deposited as security.

Politic. Promoting good policy.

Posthumous. Born after the death of the father.

Post mortem. Made after death.

Power of Attorney. The sealed instrument by which one appoints another to act in a given matter for him.

Primogeniture. The right of the eldest son to inherit his ancestor's estate to the exclusion of younger sons.

Probate. To prove; to prove a will.

Property. The exclusive right one has to anything.

Protest. An act by a notary done for want of payment of a note or draft or acceptance of a draft.

Proxy. A substitute.

Quantum meruit. So much as it deserves.

Quantum valebat. So much as it is worth.

Quasi. As though.

Quo Warranto. By what right.

Real Estate. Property consisting of lands and all that is permanently attached thereto.

Realty. Real estate.

Recognizance. A bond.

Recoup. To keep back part as a claim for damages.

Release. A relinquishment of some right; a quit claim deed.

Remainder. An estate to take effect after another's estate is determined.

Replevin. An action to recover the possession of goods wrongfully taken and detained.

Residuary Devisee. The person named in a will to have the balance or remainder after all other devisees are paid.

Salvage. A compensation for saving a vessel from wreck.

Scilicit. To-wit; namely; abbreviated in legal documents to s s.

Sentence. The judgment of the court in a criminal case.

Specialty. A contract under seal.

Specific Performance. An action in a court of equity to compel a party to perform his contract in precise terms.

Statute. A law made by the legislature.

Subpoena. A writ commanding the attendance of a person in court under penalty.

Subrogation. The substitution of another as a creditor.

Summon. To give notice.

Tenant. One who has the temporary possession of the lands of another.

Tender. An offer of a chattel or money in satisfaction of a debt.

Tenure. The mode in which one holds an estate in lands.

Testament. A will.

Testator. One who dies leaving a will.

Tort. A wrongful action for which an action will lie.

Trust Deed. A deed conveying real estate to another to be held in trust for the benefit of a third person.

Unilateral. One sided.

Usury. Illegal interest.

Vendor. A seller.

Verdict. The decision of a jury reported to the court.

Vested. Fixed; already in force; not liable to be set aside by a contingency.

Waive. To relinquish.

Warrant. To guarantee.

Waste. The destruction done or permitted to houses or woods of an estate by the tenant thereof.

Will. An instrument by which a person disposes of his property to take effect after his death.

States	May a married woman become a sole trader, and can she be held in an action at law for an indebtedness contracted while carrying on business in her own name the same as if she were single?	Can an agreement in a note to pay attorneys' fees, in case of default of payment at maturity, be enforced?	Does such an agreement void the negotiability of the note?
Ala.....	Yes, but must have husband's consent before she can convey or mortgage her real property or waive homestead.	Yes.....	No.
Ariz....	Yes.....	Yes.....	Question unsettled.
Ark....	Yes.....	No.....	No.
Cal.....	Yes, provided she obtains from the Superior Court a permit.	Yes.....	Yes.
Colo....	Yes.....	No statute or decision on this subject.	No statute or decision on this subject
Conn...	Yes, provided that, if she was married before 1877, she takes advantage of the Statutes of 1888, Section 2792.	Yes.....	No.
Del.....	Yes.....	Yes, if sum is certain.....	No.
D. C....	Yes.....	Yes.....	Yes.
Fla.....	Yes, upon leave being granted by Circuit Court.....	Yes.....	Questionable.
Ga.....	Yes, but she cannot bind herself by any contract of suretyship, and cannot be held liable for the debt of her husband.	No, unless defendant should file a plea which is not sustained.	No.
Idaho..	Yes, provided she is declared a sole trader by a Dist. Ct.	Yes.....	Questionable.
Ill.	Yes, but she cannot go into partnership without her husband's consent.	Yes, if fees are fixed and certain, and by terms of note become due when note, after maturity, is placed in hands of attorney for collection.	No, if amount of fee is fixed.
Ind	Yes, but she cannot become surety for any one, nor can mortgage or convey real estate, without her husband joining in the conveyance.	Yes, if unconditional.....	No.
Ind. Ty.	Yes.....	No.....	No.
Iowa...	Yes.....	Yes, provided attorney files statutory affidavit at commencement of suit.	
Kan....	Yes.....	No.....	No.
Ky.....	Yes.....	No. Enforcible if valid in State where made.	No.
La.	Yes, if she is a public merchant, and she is so considered if she carries on a separate trade.	Yes.....	No.
Maine..	Yes.....	No.....	No.
Md.....	It is unsafe to credit a married woman in this State, unless she has a trader's license, or unless she has property acquired by her own labor and skill, and contracts in reference to it.	Yes.....	No.
Mass...	Yes. She must file a married woman's certificate.....	Questionable.....	Yes.
Mich...	Yes, but she cannot become surety for nor form a partnership with her husband.	No.....	Yes.
Minn...	Yes, but she cannot transfer any interest in real estate, unless her husband joins in the conveyance.	Yes.....	Yes.
Miss...	A married woman has all the rights of a femme sole..	Yes.....	No.
Mo.....	Yes.....	Yes.....	Yes.
Mont...	Yes, has all the rights and liabilities of a femme sole under certain conditions.	Yes.....	No.
Neb....	Yes.....	No.....	No.
Nev....	Yes.....	Questionable.....	No.
N. H...	Yes, but she cannot become surety for her husband....	No statute or decision on this subject.	Questionable.
N. J....	Yes, but she cannot become surety for her husband, or an accommodation endorser, guarantor or surety, or liable on any promise to pay the debt or answer for the default of another, unless, on the faith of it, she obtains money, property, or things of value for her own use.	Question unsettled. Probably	No statute or decision on this subject.
N. M...	Yes.....	Yes.....	Question unsettled. Proba-
N. Y....	Yes.....	No.....	Questionable. [bly no.
N.C....	Yes, provided she enters herself as a "free trader" in office of Registrar of Deeds.	No.....	No.
N.D....	Yes.....	Yes.....	No.
Ohio...	Yes.....	No.....	No.
Okla...	Yes.....	Yes.....	No.
Ore....	Yes.....	See note A.....	No.
Pa.....	Yes, but she cannot become surety.....	Yes.....	If agreement is conditional (such as agreement to pay fees in default of payment at maturity) note is non-negotiable
R. I....	Yes.....	Yes.....	Yes, unless the terms are
S. C....	Yes, and she may become surety, guarantor or partner.		absolute and not conditioned on default.
S. D....	Yes.....	No.....	No.
Tenn...	Yes.....	No, unless note is dated prior to March 7, 1889.	No.
Texas..	She may be a merchant, but must use her separate property. She cannot carry on a partnership business, and cannot buy on credit. Her profits become liable for her husband's debts	Yes.....	No, if the agreement is to pay a specified sum; otherwise it becomes non-negotiable.
Utah...	Yes.....	Yes.....	No.
Vt.	Yes, but she cannot become surety for her husband....	Question unsettled.....	Question unsettled.
Va.....	Yes.....	Questionable.....	No.
Wash..	Yes, but she cannot become a partner in trade with her husband.	Yes.....	No.
W.Va..	Yes, but the judgment can only be satisfied out of property, real or personal, belonging to her separate estate.....	Yes, subject to approval of court.	Question unsettled
Wis....	She can carry on business in her own name with capital which is her separate property, also when her husband has deserted or refused to support her.....	Yes, but not if the agreement is in the nature of a penalty of forfeiture.	No.
Wyo....	Yes.....	Yes.....	Yes.
		Yes.....	No.

A—Yes, if agreement is to pay "such reasonable attorneys' fees as the court may adjudge, if action is instituted," but not if a specific sum or per cent is mentioned.

The following tables are as nearly correct as they can be stated in abbreviated form.

NOTE—The Statute of Frauds generally provides that no contract for the sale of any goods, wares or merchandise for the price of $—(differing as below set) shall be allowed to be good unless, 1st, the purchaser shall accept and actually receive part of the goods bought, or 2d, unless he shall give something in earnest to bind the bargain or in part payment, or 3d, unless there shall be some note or memorandum of the bargain made, and signed by the party to be charged by the contract, or by his lawful agent. The information given below under the head of "Statute of Frauds" refers only to contracts concerning personal property

EXEMPTIONS

STATE.	STATUTE OF FRAUDS.	HOMESTEAD.	PERSONAL PROPERTY.	WAGES.
Alabama	See Note F	$2,000, or 160 acres worth $2,000	$1,000*	$25.00 per month.
Alaska	$ 50 00	No Homestead	Specified articles, value from $750 to $1,000	Earnings for 30 days next preceding judgment.
Arizona	Any value	$4,000. Claim must be recorded	$1,000	Earnings 30 days preceding levy.
Arkansas	$ 30 00	¼ acre in town, 160 acres in country, not exceeding $2,500 in value	$500. *Personal property and wages not to exceed $200.	Wages for 60 days, not in addition to personal property.
California	$200 00	$5,000	Specified articles. *Personal property with homestead not to exceed $1,000	†Wages for 30 days if necessary for the support of resident family.
Colorado	$ 50 00	$2,000. Claim must be recorded	Specified articles. *Specified articles. B	$60.00.
Connecticut	$ 50 00	$1,000. Claim must be recorded	*Specified articles	$50.00.
Delaware		No Homestead	Each county has a special law	
Dist. Columbia	$ 50 00		Specified articles not exceeding $1,000	Wages for 2 months, not to exceed $200. Salary of Government employees.
Florida	Any value	½ acre in town, 160 acres in country	$1,000 to "heads of families residing in the state"	All wages.
Georgia	$ 50 00	*Constitutional* $1,600 (composed of realty or personality or both). *Statutory* 50 acres; 5 acres additional for every child under 16 with certain restrictions—must select.	Specified articles	All laborers' wages exempt from garnishment.
Idaho	$200 00	$,000—$1,000*E	*Specified articles, value about $1,000	Wages for 30 days.
Illinois	See Note F	$1,000	Married person $400, single $100	
Indiana	$ 50 00	$600 worth of property, either real or personal or part of each is allowed exemption, limited to resident householders, and resident married women.		One month's wages of employees, not exceeding $25 at one time.
Indian Territ'y	$ 50 00	$2,500, not to exceed 160 acres if in the country; all real property of Indian by blood, 160 acres of Indian by adoption.	$500 and wages not to exceed $500, when added to personality. Single persons $200, including wages; wearing apparel.	Wages for 60 days, not to exceed $500 if added to personal property.
Iowa	Any value	½ acre in town, 40 acres in country	Specified articles, and household and kitchen furniture, not to exceed $200. *Wearing apparel.	Wages for 90 days.
Kansas	Not in force when contract to be performed within a year.	1 acre in town, 160 acres in country	Specified articles	Wages for three months next preceding levy or garnishment, provided debtor files proper affidavit within twenty-four hours after notice of writ.
Kentucky	Not in force	$1,000	Specified articles. C	$50.00.
Louisiana	Over $500 00. Must be proved by one witness and corroborating testimony.	$2,000 Claim must be registered	Specified articles	All wages of laborers.
Maine	$ 30 00	$ 500. Must be recorded	Specified articles*	$20*, except in suit for necessaries, and not exceeding one month's wages.
Maryland	$ 50 00		$100*	$100.* See Note H.
Massachusetts	$ 50 00	$ 800. Claim must be recorded	Specified articles*	$20—only $10 against debts for necessities*.
Michigan	$ 50 00	$1,500	$250 stock of goods (same amount for each partner) also some specified articles.	$25.
Minnesota	$ 50 00	*One lot in city. *½ acre in town. *80 acres in country. See note G	Specified articles*, about $1,500, printing material $2,000. Life insurance to survivors $10,000	$25*

Mississippi	$ 50 00	$2,000. If in country must not exceed 160 acres	For country, numerous articles; for towns, $250 in value.	$100 per month to head of family. Others $20.
Missouri	$ 30 00	$3,000 in city. $1,500 in country and small towns	Specified articles or $300	Wages for 30 days.
Montana	$200 00	$2,500	Specified articles	Wages for 30 days.
Nebraska	$ 50 00	$2,000	$500—not additional to homestead	Wages for 60 days.
Nevada	$ 50 00	$5,000	Specified articles*	Wages not exceeding $50 earned in calendar month during which process issues.
N. Hampshire	$ 33 00	$ 500*	Specified articles*	$20, not good as against debts for necessaries.
New Jersey	$ 30 00	$1,000 if advertised and recorded	$200 and wearing apparel	All wages.
New Mexico	$ 50 00	$1,000	Specified articles and $500 when not owning a homestead.	Wages for 3 months under certain circumstances.
New York	$ 50 00	$1,000, provided deed creating the estate states that property is to be held as a homestead.	Certain specified articles and $250 worth in addition, except for purchase price	Wages for 60 days.
N. Carolina	Not in force.	$1,000	$500*	60 days wages if necessary for support of debtor's family.
N. Dakota	$ 50 00	$5,000. *If widow or widower occupy premises the same.	$1,500	None.
Ohio	Not in force.	$1,000, $500 in lieu of homestead	Specified articles	Personal earnings of self or minor children earned within three months if necessary for support of family. (I)
Oklahoma	Excess of $50 00	160 acres in country, one acre in city or town.	Specified articles	"Current wages for 90 days," to head of family; to other persons "current wages.
Oregon	$ 50 00	$1,500, but in no instance less than 20 acres in country or one lot in city or town.	Specified articles	30 days wages if necessary for support of family.
Pennsylvania	See Note F.		$300. *D	All wages.
Rhode Island	See Note F.		Household furniture to $300, working tools, books to value $300, professional library and several other articles	$10 exempt except as against debts for necessities—salary and wages of wife and minor children.
South Carolina	$ 50 00	$1,000	$500	Wages for 60 days, if family depends on them (to married or single men).
South Dakota	$ 50 00	160 acres in country, 1 acre in town or city value $5,000.	$750 on all debts created since July 1, 1890. to heads of families, and $300 to single persons not heads of families; otherwise $1,500 to all persons. All life insurance money received by widow or children. No exemption against purchase price	Wages for 60 days if necessary to support of family.
Tennessee	Not in force.	$1,000	Specified articles	$30 for laborers and mechanics.
Texas	Not in force.	200 acres and improvements in country, $5,000 lot and improvements in city.	Specified articles	*All wages.
Utah	$300 00	$1,500, $500 wife, $250 for each child	Specified articles not exceeding $1,000. *A few articles	One-half wages for 60 days, not exceeding $100.
Vermont	$ 40 00	$500	Specified articles. *A few articles.	$50 per month.
Virginia	Not in force.	$2,000	Specified articles	Current (I) wages to the amount of $100, if family is dependent thereon.
Washington	$ 50 00	$2,000, homestead declaration necessary	Specified articles; to householder $1,000 in addition.	
West Virginia	Not in force.	$1,000	$200, including wages. *A few articles	Wages 3 months not exceeding $60 per month.
Wisconsin	$ 50 00	¼ acre in town, 40 acres in country	Specified articles not exceeding $200. $1,500 of printing presses and material.	
Wyoming	$ 50 00	$1,500	$800—$300*	Wages not exceeding $100.

* Applies also to single men.
† One-half wages liable for debts of necessities.
a All exemptions apply only to families.
B Library and implements of professional men exempt.
C To constitute valid sale, actual or constructive possession must be given the purchaser.
D Not limited to personalty, but may be allowed out of real estate.

E Declaration of homestead must have been filed with recorder to enable debtor to claim same.
F Not in force as to goods, wares and merchandise.
G Homestead not allowed single men unless they actually reside on the lot.

H An attachment only binds what is due when laid, and does not reach what may mature between date of service and date of trial.
I If debt is for "necessaries" 10 per cent of personal earnings is not exempt.

States	How Soon after Assignment must claim be presented to Assignee in order to participate in the estate?	Does Participation in Distribution of Assets necessarily Release the Debtor?
Ala....	Within a reasonable time. Later than six months would be unreasonable.	No.
Ariz...	Any time before estate is closed, unless assignment provides for discharge of debtor, in which case creditor must elect before four months, and must within six file particulars of his claim. If assignee has made a distribution before claim is filed, the tardy creditor does not share in it.	Yes, provided assignment is made with that condition.
Ark....	Any time before estate is closed. If assignment provides for release of debtor, it must specify a time in which creditors are to accept.	Yes, provided assignment is made withithat condition.
Cal....	Thirty days after notice from assignee.....	No, except by agreement of creditors.
Colo...	Assignee must close the trust in one year, unless time is extended by court; claims filed within first three months have priority.	Yes.
Conn..	From three to six months.....	If creditors receive 70% of claims allowed, court may discharge debtor from all claims proven, and may exempt his property for two years from any process on claims which might have been proven.
Del....	Any time before estate is closed.....	No.
D.C....	Any time before estate is closed.....	No, unless assignment is accepted with that condition.
Fla....	By non-residents four months, by residents sixty days from time of publication of assignee's notice.	No.
Ga....	Any time before estate is closed.....	No.
Idaho..	On the day fixed by Court, notice of which is sent to creditors.	Yes.
Ill....	Within three months of date of notice by assignee.....	No.
Ind....	Any time before estate is closed, but trustee must make final report at expiration of one year.	No.
Ind.Ty.	Any time before assignee makes final settlement, unless deed of assignment provides otherwise.	No, unless the deed of assignment so provides.
Iowa...	Within three months of date of public notice by assignee..	No.
Kan....	On date fixed by assignee, which must be within six months after date of assignment.	No.
Ky.....	Any time before estate is closed, but should be filed promptly to share in all distributions.	No.
La.....	Any time before assignee or syndic files his final account...	Yes.*
Me.....	Any time before final dividend is declared but creditors will not participate in prior dividends.	Yes.
Md.....	On the date fixed by the trustee in his public notice to creditors.	No, unless discharged by insolvent Court, which does not bind non-resident creditors unless they accept the jurisdiction.
Mass...	In accordance with the terms of the assignment.....	Assignments for benefit of creditors are usually voided by insolvency proceedings. In the latter, proofs must be made out on blanks furnished by Court and presented at one of the regular meetings called for that purpose. If a debtor receives his discharge all debts due to residents are subsequently barred, also those due non-residents which were not proved.
Mich...	Within ninety days from date of notice.....	No.
Minn..	Claims may be filed until time limited by order of court, after which time they may only be filed by special permission of Court.	Assignments may be made under the assignment law or under the insolvency law. Creditors participating in either of these proceedings may
Miss...	Any time before estate is closed.....	No.
Mo.....	On one of three days fixed by assignee, notice of which must be sent to all known creditors.	have to release the debtor from all further claims after participation in distribution of assets.
Mon...	Any time before estate is closed.....	No.
Neb....	Claims must be filed in County Court on or before the day fixed by the Court, which shall not be less than thirty days nor more than sixty days after the selection of an assignee by the creditors.	No.
Nev....	On or before such time as the Court may fix for the first meeting of creditors.	Yes, if the cash value of debtor's surrendered property amounts to at least 50% of his liabilities, or if three-fourths in number and one-half in amount of his creditors consent in writing to his discharge.
N.H....	Within two months from beginning of insolvency proceedings. Claims may be filed later, but do not participate in prior dividends; but in any subsequent dividend the claim, if allowed, shall be a preferred claim for dividends equal to previous ones.	Yes, if the assets are sufficient to pay preferred claims and 50% on all other claims, or if two thirds in number of creditors proving their claims representing two-thirds in value of the debts consent in writing to accept a less per cent.
N.J.. .	Before advertised date, not less than three months after assignment. Claims may be filed later, but do not participate in prior dividends.	Yes, if creditors present claims; r t bound to present claims, however.
N. M	date published by assignee, notice of which must be sent to known creditors.	No.

*Assignments by that name do not exist in this State. An insolvent debtor makes a surrender of his property. A meeting of creditors is called for a particular day, before a designated notary, and the creditors vote for a syndic who has charge of the debtor's estate. Such surrendering debtor is discharged from further liability to all those creditors placed by him on his schedule of assets and liabilities, filed by him at the time of making the surrender, provided he is discharged by a majority of his creditors in number and amount. If the surrender be not made into Court, the question of discharge or no discharge becomes a mere matter of contract, those creditors only who have consented to a discharge being bound thereby.

States	How Soon after Assignment must claim be presented to Assignee in order to participate in the estate?	Does Participation in Distribution of Assets necessarily Release the Debtor?
N.Y....	Any time before distribution of estate.....	No.
N.C....	Any time before estate is closed, but non-filing before day fixed by assignee may deprive claimant of full pro rata of assets	No.
N.D....	Any time before estate is closed.....	Yes.
Ohio...	Within six months after publication of notice by assignee. Claims filed after that share in undistributed proceeds. If rejected, suit must be brought in thirty days.	No.
Ok.....	No time is fixed.....	No.
Ore....	Within three months after receipt of notice from assignee..	No, unless the estate pays 50% and all expenses, an assignment is free from fraud.
Pa.....	Any time before estate is closed.....	No.
R.I.....	Any time before settlement of the estate by the assignee..	Yes. Creditors residing without the State must file a stipulation agreeing to be bound by our laws and by any discharge, order or decree made by the proper Court.
S.C....	Within time limited in the assignment, or, where no time is limited, any time before the assets are all divided among creditors.	An assignment usually provides for two classes of creditors.†
S.D....	Any time before estate is closed.....	No.
Tenn...	Within time fixed by assignee in published notice.....	No.
Texas..	Notice of acceptance must be sent assignee within four months, and claims filed within six months from time of publication of notice of assignment.	Yes, if the assignment is made with condition of release, and provided creditors get 33⅓%.
Utah,..	Within three months from date of publication of notice by assignee.	No.
Vt.	At any meeting of creditors within six months after proceedings are instituted, which meetings are called at the discretion of Court.	Yes, provided the assets show a value equal to 30% of claims proved, or provided the majority in amount and number of creditors consent in writing to discharge.
Va.....	Any time before estate is closed, unless the deed of assignment prescribes a time at which it must be done.	Yes, provided assignment is made with that condition.
Wash..	Within three months from date of publication of notice. Claims may be filed subsequently, but do not participate in dividends until payment in full of all claims presented within three months.	Yes.
W.Va..	Any time before estate is closed, unless trust deed provides otherwise.	No.
Wis....	Within three months from execution of deed of assignment..	Yes.
Wyo...	Within 6 months after first publication of notice by assignee	Yes.

† First, those who accept the terms within a limited time and execute releases to the debtor; second, all other creditors. The assigned property is first applied to the payment of claims of the first class; the balance, if any, to payment of claims of the second class. The debtor is released from debts of creditors of the first class, but not from those of the second class.

ATTACHMENTS.

State	Do attachment creditors take pro rata, or have they priority in the order of their attachments?	When statutory grounds of attachment exist, is attachment allowed whether claim is due or not?	Is bond required, and in what amount?
Ala....	Priority.....	Yes.....	Yes, in double amount of claim sued on.
Ariz ...	Priority.....	Allowed only when claim is due and made or payable in Ariz.	Yes, in amount not less than debt sworn to.
Ark....	Priority.....	Yes.....	Yes, bond required to the effect that the plaintiff shall pay defendant all damages he may sustain if the attachment is wrongfully brought.
Cal	Priority.....	Attachment allowed only when claim is due, and provided contract is (in cases against residents) made or expressly payable in this State.	Yes, not less than $50.00 or more than $300.00 in Justice Court, and not less than $200.00 in Superior Court, nor more than the amount claimed by the plaintiff.
Colo ...	All claims sued on within 30 days (20 days before J.P.) after attachment suit, prorate.	Yes, but fraud must be alleged when claim not due.	Yes, in double the amount of the claim.
Conn...	Priority.....	Yes.....	No bond required, except non-resident plaintiff
Del....	In attachments against residents of the State, creditors prorate. They have priority, however, against non-residnts	No.....	No bond required. [must furnish cost bond.
D.C....	Priority.....	No.....	Bond required in double amount of claim.
Fla	Priority.....	Yes, provided it will become due in nine months.	Bond required in double amount of claim.
Ga.....	Priority.....	Yes, except when attachment is on ground of non-residence.	Bond required in double amount of claim.
Idaho..	Prorate.....	No.....	Bond required in the sum of $200.00, or not to exceed the amount of claim in District Court: In Justice Court, $50.00.
Ill.	Prorate in all suits returnable to the same term of court	No.....	Bond required in double amount of claim.
Ind	Prorate.....	Yes.....	Bond required to the effect that plaintiff will pay defendant all damages he may sustain if proceeding is wrongful and oppressive.
Ind. Ty.	Priority.....	Yes.....	Bond required providing for payment of all damages which may accrue.
Iowa...	Priority.....	Yes.....	Bond required in three times the amount of the claim, and not less than $50 in Justice Court nor $250 in Court of Record.
Kan ...	Priority.....	Yes, but if claim is not due, an order of Court must first be obtained upon proper showing..	Bond required in double amount of claim, except that in cases against non-residents no bond is required.
Ky.....	Priority.....	Yes.....	Bond required in double the amount of the claim.
La.....	Priority.....	Yes.....	Bond required equal to the amount of claim.

State	Do attachment creditors take pro rata, or have they priority in the order of their attachments?	When statutory grounds of attachment exist, is attachment allowed whether claim is due or not?	Is bond required, and in what amount?
Maine..	See Note A.....	No.....	No bond required in attachment of real estate, and only on attachment of personal property when officer demands indemnity, and then usually in double amount of claim.
Md.....	Priority.....	Yes, in cases of fraud or absconding.	Bond required in case of resident, but in case of absconding or non-resident debtors, no bond required.
Mass...	Priority.....	No.....	No bond required.
Mich...	Priority.....	Yes, but if claim is not due, an order of Court must first be obtained by proper showing.	No bond required in Circuit Court, Bond required for double amount of claim in Justice Court. Officers may demand indemnity, when ownership of property attached is in doubt.
Minn..	Priority. See Note B.....	No, except for fraud.....	Bond required in amount not less than than $250.00 in all cases in the District Court.
Miss...	Priority.....	Yes, if ground for attachment be one of the last six provided by statute, or when debtor is about to or has removed self or property out of the State with fraudulent intent.	Bond required in double amount of claim.
Mo.....	Priority.....	Yes, except when ground of attachment is non-residence, when claim must be due.	Bond required in double amount of claim.
Mont..	Priority, except where levied together, when they prorate.	Yes, under contingencies named in statute.	Bond required in double amount of claim, but, if claim is over $1,000, need only be for amount of claim. In no case need it exceed $10,000.
Neb....	Priority, except when received at the same time by the sheriff, when they prorate.	Yes.....	Bond required in double amount of claim, except where debtor is a foreign corporation or a non-resident, in which cases no bond is required, unless debt not due, in which event bond required.
Nev....	Priority.....	Yes, in case of fraud.....	Bond required in amount not less than $200, and not exceeding amount of claim.
N.H....	Priority.....	No.....	No bond required, but all writs in favor of non-residents must be endorsed by some responsible inhabitant of the State for costs.
N.J....	First attachment has priority; subsequent attachments prorate.	No, but other creditors whose claims are not due, may come in under attachment already issued..	No bond required.
N.M...	Priority.....	Yes.....	Bond required in double amount of claim.
N.Y....	Priority.....	No, except where credit is procured by fraud. The creditor is entitled to rescind the sale.	Bond of $250 required with two resident sureties.
N.C....	Priority.....	No; claim must be due.	Bond required in the sum of not less than $200.00; amount is fixed by Court.
N.Dak.	Priority.....	Yes.....	Bond required in amount of claim, and in no case less than $250, except in Justice Court, $50.
Ohio...	Priority.....	Yes, in cases of fraud, by allowance of court.	Bond required in double amount of claim, except when debtor is a non-resident or foreign corporation, in which case no bond required.
Okla...	Priority.....	Yes, by allowance of Judge on proper showing.	Bond required in double the amount of claim. No bond required when defendant is a foreign corporation or a non-resident.
Ore....	Priority.....	No; claim must be due.....	Bond required equal to amount of claim, and in no case less than $100.00.
Pa.....	See Note C.....	No; claim must be due.....	Bond required in double the amount claimed.
R. I....	Priority, but a general assignment made within 60 days dissolves all attachments.	No; claim must be due.....	No bond required. Officers sometimes demand indemnity when ownership of property is uncertain,
S. C....	Priority, but if an attachment is allowed to remain over 60 days, a debtor may be adjudged insolvent.	Yes, when attachment issued for fraud.	Bond required, at least $250.00 in Court of Common Pleas, and $25.00 in Justice Court.
S. Dak.	Priority.....	Yes.....	Bond required in at least amount of claim specified in affidavit, and in no case less than $250.00 in Circuit Court.
Tenn..	Priority.....	Yes, except when ground of attachment is non-residence, then claim must be due.	Bond required in double amount of claim.
Texas..	Priority.....	Yes.....	Bond required in double amount of claim.
Utah..	Priority.....	Yes, in case of fraud, or where the debtor is about to leave the Territory.	Bond required in amount of claim.
Vt.....	Priority.....	No, except in case of a running account where part is due, then attachment may be had for whole amount.	No bond required, except for costs.
Va.....	Priority.....	No, except against non-residents or persons removing their property beyond the State.	Bond required in double amount of claim.
Wash..	Priority.....	Yes.....	Bond required in double amount of claim.
W.Va..	Priority.....	Yes.....	Bond required in double amount of claim, but none required when levy is on real estate.
Wis....	Priority.....	Yes.....	When claim is due, bond required in the sum of not less than $250.00; when not due, in three times the amount of the claim.
Wyo...	No; however, in Justice Courts creditors take pro rata before same Justice.....	Yes.....	Bond required in double amount of claim.

A—Priority, unless insolvency proceedings intervene, and an assignee is appointed, when attachments made within four months of the commencement of insolvency proceedings are vacated.

B—In Minnesota, attachments are set aside by assignments, so that the priority of an attachment usually amounts to nothing.

C—Domestic attachments (nearly obsolete) inure to benefit of all creditors pro rata; foreign attachments have priority from time of levy, and attachments against fraudulent debtors from time when placed in sheriff's hands.

States	Must the mortgage be renewed, and when?	Are they valid as to third parties on the stock of merchandise remaining in possession of and under control of mortgagor?	Are they valid (as to third parties) on after acquired property?
Ala.	No.	No.	No.
Aris.	No.	No.	No.
Ark.	No.	Same as Kansas.	No.
Cal.	No.	No.	No.
Colo.	Yes, promptly at maturity.	No.	Yes, if bona fide.
Conn.	No.	No.	No.
Del.	Yes, every three years.	Yes.	No.
D.C.	N	No.	No.
Fla.	No.	No.	Questionable.
Ga.	No.	Yes.	Questionable.
Idaho.	Questionable	No, unless proceeds of sale go to mortgagee.	No.
Ill.	See note A.	No.	No.
Ind.	No.	Yes.	Doubtful.
Ind. Ty.	If recorded, no renewal necessary; if filed, then thirty days before expiration of one year there must be filed an affidavit of non-payment, to be of notice to third parties.	Yes, but mortgagor must act as agent for mortgagee.	Doubtful
Iowa.	No.	Yes.	Yes.
Kan.	Yes, within 30 days preceding the expiration of one year, and each year thereafter.	Yes, if mortgagor acts as agent of mortgagee where sales are made.	Doubtful.
Ky.	No; good for 15 years if note is given; no note 5 years	Yes, if goods can be identified.	No.
La.	Chattel mortgages are unknown in this State, and nothing takes their place.	Chattel mortgages unknown in this State, and nothing takes their place.	Chattel mortgages are unknown in this State.
Maine.	No.	Yes.	No. See Note B.
Md.	No.	Doubtful.	Probably, if mortgagee takes possession before
Mass.	No.	Yes, on the original goods remaining.	No. rights of third
Mich.	See note C.	Yes.	Yes. parties attach.
Minn.	No; but as against creditors and subsequent purchasers, life of mortgage is 6 years.	No.	Yes, if mortgage so recites.
Miss.	No.	No.	Yes.
Mo.	No.	No, unless the proceeds of sales go to the mortgagee in reduction of mortgage debt.	Not as against execution or attachment creditors who secure a lien before mortgagee takes possession.
Mont.	Must be renewed at or before maturity can only be drawn for one year, but may be renewed once.	Yes, if made in good faith, and proceeds of sales to go to mortgagee.	Doubtful.
Neb.	No, but lien of mortgage continues for only five years from date of its filing.	No.	No.
Nev.	A mortgage in Nevada is good for six years from date of maturity of debt secured.	Yes.	Undecided.
N.H.	No.	No, unless the proceeds of sale go to the mortgagee in reduction of the mortgage debt.	No.
N.J.	No	Yes, if recorded.	Yes, if so drawn.
N.M.	Annually.	No.	Doubtful.
N.Y.	Yes, every year, by re-filing within 30 days before expiration.	No, unless mortgage provides that mortgagor is in possession as agent of mortgagee, and sales to be for cash and to be applied in reduction of mortg. debt	No.
N.C.	No.	No, unless mortgagor has possession as mortgagee's agent, and proceeds go to reduction of mortgage debt.	No.
N.D.	Within 90 days next preceding the expiration of three years from date of filing.	Yes, if mortgagor is required to account to mortgagee for proceeds for sales.	Yes.
Ohio.	Yes, annually, and within 30 days preceding the end of the year.	No, unless mortgagee takes possession before third party makes levy, or unless mortgagor is made in the mortgagee agent for mortgagee, and required to account to mortgagor for all sales.	Yes, unless it appears in the mortgage that the merchandise is to be sold and proceeds applied for benefit of mortgagor.
Okla.	Yes, within 30 days next preceding expir of 3 yrs.	Yes	No.
Ore.	Yes, within 30 days preceding the expiration of each year. If executed and acknowledged as a real mort., and recorded, no renewal required.	No.	No.
Pa.	Yes, within three months after maturity.	Chattel mortgages are only authorized on certain articles specified in act of May 20, 1891.	No
R.I.	No.	Yes, if properly made and recorded.	Not as against attaching creditors who may secure
S.C.	No.	Yes.	Yes. lien before mort-
S.D.	Yes, within 30 days next preceding expiration of limit, which is three years from date of filing. It can be renewed for three years longer.	Yes, provided mortgagor is required to account to mortgagee for proceeds of sales.	Yes. gagee gets possession.
Tenn.	No	No	No

A—Chattel mortgages must be acknowledged before a Justice of the Peace in the township in which the mortgagor resides, and must be recorded with the Recorder of Deeds of the county where the mortgagor resides, except that non-resident mortgagors may acknowledge chattel mortgages before any officer authorized by law to take acknowledgments of deeds, and in the case of the mortgagor being a non-resident the mortgage may be recorded in the county where the property is situated. Notes secured by chattel mortgage must state upon their face that they are so secured, otherwise the chattel mortgage securing the note is absolutely void. A chattel mortgage is not good for a period to exceed two years, unless within thirty days next preceding the maturity of the obligation an affidavit is made by both the mortgagor and mortgagee showing the amount remaining due upon the notes secured by the mortgage, which affidavit shall be filed for record in the office of the Recorder of Deeds where the original mortgage is recorded, and also with the Justice of the Peace before whom the original mortgage was acknowledged. The affidavit shall also show the extension that is granted, which must not exceed two years from the date of the filing of the affidavit. Chattel mortgages on household goods must be foreclosed in a court of record. Husband and wife must join as to household goods.

B—No, but goods purchased with proceeds of goods mortgaged will be held by a properly worded mortgage.

C—Mortgages are not valid against third parties after one year from filing of the same, unless within thirty days next preceding the expiration of the year an affidavit of renewal is attached to and filed with the mortgage. An affidavit filed after the expiration of the year will continue the mortgage in effect except as against intervening purchasers or mortgagees. Mortgages are good for six years.

States	Must the mortgage be renewed, and when?	Are they valid as to third parties on the stock of merchandise remaining in possession of and under control of the mortgagor?	Are they valid (as to third parties) on after acquired property?
Texas..	No.....	No.....	No, unless property has a potential existence at time
Utah...	The lien continues for only 90 days after maturity, provided the maximum period does not exceed 15 months in all.	No.....	Doubtful. mortgage is given.
Vt.....	No.....	Yes.....	Yes.
Va.....	No.....	Same as North Carolina.....	No.
Wash..	If mortgage is for less than $300, affidavit showing amount due will renew same for one year. Over $300, no.	Yes, but the mortgage should be drawn so that the mortgagor must apply sales in payment of mortgage debt.	Yes, if mortgage is properly drawn.
W.Va..	No.....	No.....	No.
Wis....	Yes, within 30 days next preceding expiration of two years from time of filing.	Yes, provided sworn statements are filed every 60 days, showing amount of goods sold, amount added, and payment made on mortgage debt.	No.
Wyo...	Yes, within 60 days after date of maturity of secured debt.	Yes, if proceeds of sales are applied to the debt secured.	Yes.

ESTATES OF DECEASED PERSONS.

How Soon Must Demands be Presented for Allowance?

Alabama—Within twelve months from date of letters of administration.

Arizona—Within ten months after advertisement of notice to creditors when estate exceeds $3,000, and within four months when estates are of less value.

Arkansas—Within two years from date of granting letters of administration. Claims filed first year take precedence.

California—Within four months from date of first publication of notice to creditors, except where the estate exceeds $10,000, when ten months is allowed.

Colorado—Within one year from date of granting letters of administration.

Connecticut—Time fixed by Probate Court. It is not less than six nor more than twelve months from date of order of limitation.

Delaware—Within one year from date of granting letters of administration.

District of Columbia—Within one year from date of granting letters of administration.

Florida—Within two years after publication of notice to creditors, unless value of estate is less than $2,000, when one year is allowed.

Georgia—Within one year from date of granting letters of administration.

Idaho—Within four months from date of granting letters of administration; but if the estate exceeds $1,500 in value, ten months is allowed.

Illinois—Within two years from date of granting letters of administration.

Indiana—Any time before thirty days before final settlement. If filed after one year, must be prosecuted at cost of claimant.

Indian Territory—Within two years from the granting of letters of administration.

Iowa—Within one year from first publication of notice by administrator or executor; but claims presented within first six months have a priority over those presented later.

Kansas—Within three years, but those presented the first year take precedence over those presented the second year; so also those presented the second year take precedence over those presented the third year.

Kentucky—Any time before estate is closed. If not presented within one year after appointment of administrator, interest cannot be collected.

Louisiana—Any time before administrator or executor files his final account.

Maine—Within two years of date of notice by executor or administrator of his appointment.

Maryland—Administrator may close estate in six months, but is allowed one year from date of letters; claims may be filed before estate is closed.

Massachusetts—Within two years of date of filing of official bond by executor or administrator.

Michigan—Within six months from date of appointment by Probate Court of Commissioners on claims of such estates.

Minnesota—Time is fixed by Probate Court at time of granting letters. Not less than six months nor more than one year from date of order

Mississippi—Within one year from date of publication by administrator or executor of notice to file claims.

Missouri—Within two years from date of appointment of executor or administrator, but claims filed within the first year take precedence.

Montana—Within four months after date of first publication of notice to present claims, except when the estate exceeds $10,000 in value, in which case ten months is allowed.

Nebraska—Within such time as the Probate Court shall allow, which shall be not less than six months and not more than eighteen months.

Nevada—Within four months after publication of notice to creditors Estates not exceeding $2,000 are subject to "summary administration." In such cases, all notices except notice to creditors, may be dispensed with, and the law does not require a four months' notice in this character of estates. They are usually settled within ninety days.

New Hampshire—Within two years from the original granting of letters of administration; but if estate is settled as insolvent, claims must be presented to Commissioner at a public hearing given by him upon advertised days within nine months of his appointment.

New Jersey—Within the time limited by rule obtained by personal representative—usually nine months.

New Mexico—Within one year, and suit must be brought within eighteen months from date of granting letters of administration.

New York—Disputed claims must be referred by agreement in writing between the representative and the claimant or sued on within six months after rejection: undisputed claims will be admitted any time before estate is settled.

North Carolina—Within one year from date of granting letters of administration.

North Dakota—Within four months from date of notice of publication of notice to creditors to present their claims. When the estate exceeds $5,000, six months is allowed.

Ohio—Should be within one year: may be within two years; (one year additional allowed on subsequently matured claims). If claim is rejected, suit must be brought in six months

Oklahoma—Within six months when the estate exceeds $5,000, and four months when it is less.

Oregon—Within six months in order to participate in the first distribution of assets. They may be presented at any time before filing settlement, and will be good against the property remaining undisposed of.

Pennsylvania—Within one year from date of granting letters of administration; but all debts are liens upon real estate, whether presented or not, for two years after decedent's death, and are payable out of personal estate so long as any remains undistributed, until barred by statute of limitation; suits must be brought within two years, otherwise lien lost.

Rhode Island—Within six months from the time when the administrator or executor gives public notice of his appointment. Claims cannot be sued upon until after first year

South Carolina—Within one year from date of probating of will or granting of letters of administration.

South Dakota—Within four months of date of notice of publication to creditors. When the estate exceeds $5,000 in value, six months is allowed.

Tennessee—Within two years and six months after date of granting letters of administration, by residents, and three years and six months by non-residents

Texas—Within twelve months from date of granting letters of administration.

Utah—Within ten months from date of publishing notice for creditors to present their claims; but where the value of the estate is less than $3,000, claims must be presented within four months.

Vermont—Within such time as the Probate Court allows, but not more than eighteen months nor less than six months from date of granting letters of administration.

Virginia—Within twelve months from date of granting letters of administration.

Washington—Within one year of date of publication of notice.

West Virginia—Should be filed within one year, but may be filed any time before final accounting or settlement of estate.

Wisconsin—Within the time which the court shall allow, which time cannot exceed one year, nor can it be less than six months.

Wyoming—Within one year after date of granting letters of administration.

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